United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2109. 698

ROBERT MAGAW, APPELLANT,

vs.

AMELIA E. HUNTLEY, LYDIA H. TILTON, HETTIE H. FAGUE, INDIVIDUALLY AND AS TRUSTEES OF THE WOMAN'S FOREIGN MISSIONARY SOCIETY OF THE METROPOLITAN MEMORIAL METHODIST EPISCOPAL CHURCH, ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JANUARY 19, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1910.

No. 2109.

ROBERT MAGAW, APPELLANT,

vs.

AMELIA E. HUNTLEY, LYDIA H. TILTON, HETTIE H. FAGUE, INDIVIDUALLY AND AS TRUSTEES OF THE WOMAN'S FOREIGN MISSIONARY SOCIETY OF THE METROPOLITAN MEMORIAL METHODIST EPISCOPAL CHURCH, AND SARAH D. LA FETRA, INDIVIDUALLY AND AS PRESIDENT OF THE WOMAN'S FOREIGN MISSIONARY SOCIETY OF THE METROPOLITAN MEMORIAL METHODIST EPISCOPAL CHURCH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2109.

ROBERT MAGAW, Appellant,
vs.
AMELIA E. HUNTLEY et al.

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a Supreme Court of the District of Columbia.

In Equity. No. 27393.

ROBERT MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY, LYDIA H. TILTON, HETTIE H. FAGUE, Individually and as Trustees of the Woman's Foreign Missionary Society of the Metropolitan Methodist Episcopal Church; Sarah D. La Fetra, Individually and as President of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church; Van Brunt Magaw, Frederick L. Magaw, Stephen Magaw, Defendants.

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill to Cancel Deed.*

Filed Oct. 8, 1907.

In the Supreme Court of the District of Columbia, Holding Equity Court.

Equity. No. 27393.

ROBERT MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY, LYDIA H. TILTON, HETTIE H. FAGUE, Individually and as Trustees of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church; Sarah D. La Fetra, Individually and as President of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church; Van Brunt Magaw, Frederick L. Magaw, Stephen Magaw.

To the Supreme Court of the District of Columbia, Holding an Equity Court for said District:

The complainant showeth to the Court as follows, upon information and belief:

First. The complainant, Robert Magaw, is a citizen of the United States and a resident of the Borough of Brooklyn in the City and State of New York, and files this suit in his own right as a grand-son and heir-at-law of Alice D. Magaw, deceased.

Second. The defendants, Amelia E. Huntley, Lydia H. Tilton and Hattie H. Fague, residents of Washington, District of Columbia,
2 are sued as individuals in their own right and as Trustees of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of the City of Washington, District of Columbia, an unincorporated society organized for the purpose of promoting the cause of foreign missions under the auspices of the said Church; the defendants, Sarah D. La Fetra, and Lydia H. Tilton, residents of Washington, District of Columbia, are sued both as individuals and as President and Secretary of the same society; the defendant, Van Brunt Magaw, a resident of Brooklyn in the City and State of New York is sued as an individual in his own right; the defendant, Frederick L. Magaw, a resident of the Borough of Brooklyn, in the City and State of New York, is sued as an individual and in his own right. All the above defendants are of full and lawful age.

Third. The complainant is a grand-son of Alice D. Magaw, lately a resident of the City of Washington, District of Columbia, who departed this life on the 10th day of August, A. D. 1907 at the advanced age of 83 years, leaving the following heirs-at-law, all of whom, with the exception of the complainant, are defendants herein, to-wit: Van Brunt Magaw, a son, Frederick L. Magaw, a son, and Stephen Magaw, a grandson, all residents of the State of New York as hereinbefore alleged. The aforesaid decedent was on the 28th day of May A. D. 1907, and for some time prior thereto, the owner of certain real estate in the City of Washington District of Columbia, more particularly described as lots Number Twenty and Twenty-one (20 and 21) in John G. Ames' and R. A. Morrison's subdi-
vision of part of square 758, as per plat recorded in book 13,
3 folio 46, in the Land Records of the Surveyor's office of the District of Columbia.

Fourth. The Complainant further showeth that on the 28th day of May A. D., 1907 the defendants, Amelia E. Huntley, Lydia H. Tilton, Hattie H. Fague and Sarah D. La Fetra, procured the said Alice D. Magaw to execute and deliver to the aforesaid Amelia E. Huntley, Lydia H. Tilton and Hattie H. Fague, Trustees of The Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of Washington, District of Columbia, a Deed of conveyance of the above described property, thereby vesting apparent legal title to said lots in the said Amelia E. Huntley, Lydia H. Tilton, and Hattie H. Fague, Trustees of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of Washington, District of Columbia, who caused the same to be recorded in the land record of said city and District aforesaid, on the 28th day of May, A. D. 1907. A duly certified copy of said deed as so recorded is hereto annexed numbered "Exhibit A" and is made a part hereof. The complainant further

alleges that neither the said Trustees nor anyone else on their behalf or otherwise paid the aforesaid decedent any consideration of value of any kind whatsoever for the execution by her of the aforesaid conveyance and the same was without any consideration of any kind whatsoever, although the consideration named in said deed was alleged to be the sum of $10.00.

Fifth. The complainant further showeth that the said Alice D. Magaw and the defendants, Amelia E. Huntley, Lydia H. Tilton,
Hattie H. Fague, and Sarah D. La Fetra, were members of
4 the Metropolitan Memorial Methodist Episcopal Church of
Washington, D. C. and also of the Woman's Foreign Missionary Society and that because of said affiliations and associations relations of intimacy and confidence subsisted between the decedent and the said defendants named in this paragraph both at the time of the execution of said deed and for some time prior thereto.

Sixth. The complainant avers that at the time said deed was executed and for a long time prior and subsequent thereto the said Alice D. Magaw, who was 83 years of age, was in an enfeebled condition of mind and body and was thereby rendered readily susceptible to influences exerted or attempted to be exerted by others.

Seventh. The Complainant further avers that the aforesaid defendants, Amelia E. Huntley, Lydia H. Tilton, Hettie H. Fague and Sarah D. La Fetra and others well knowing the aforesaid condition of the said decedent and with the intention of cheating and defrauding the heirs-at-law of said decedent out of their share of the aforesaid property and taking advantage of their close and intimate relations with the decedent procured her to execute and deliver said deed without the knowledge of said heirs-at-law and thereafter placed the same on record.

Eighth. The Complainant further showeth that by virtue of the said alleged Deed the said Trustees of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of Washington, District of Columbia, are in possession of said property, claiming to be the exclusive owners thereof for the pur-
pose in the said deed set forth and they refuse to permit any
5 of the heirs-at-law of said decedent to have the rents or profits.

Ninth. The complainant further avers that he and the defendants, Van Brunt Magaw, Frederick L. Magaw and Stephen Magaw, are the tenants in common of said property and have been since the death of Alice D. Magaw, aforesaid. Van Brunt Magaw, Frederick L. Magaw and Stephen Magaw are made defendants to this action for the reason that they refuse to join as complainants.

Tenth. Your complainant therefore charges and avers that the aforesaid deed should be set aside as fraudulent and void. And the complainant is entitled to have the same cancelled and set aside and so declared null and void.

And because they are without adequate remedy at law the complainants pray as follows:

(*a*) That writs of subpœna may be issued from this honorable Court directed to the defendants, Amelia E. Huntley, Lydia H. Tilton, Hattie H. Fague, Sarah D. La Fetra, Van Brunt Magaw,

Frederick L. Magaw, and Stephen Magaw, commanding them to appear and answer the exigencies of this complaint.

(*b*) That the aforesaid Deed, dated the 28th day of May, A. D. 1907 be decreed null and void and that the same be vacated and set aside and for naught held.

(*c*) And for such other and further relief as to the Court may seem right and proper.

ROBERT MAGAW.

The defendants are Amelia E. Huntley, Lydia H. Tilton, Hattie H. Fague, Sarah D. La Fetra, Van Brunt Magaw, Frederick L. Magaw, Stephen Magaw.

E. HILTON JACKSON,
Solicitor for Complainant.

6 STATE OF NEW YORK,
County of Kings, ss:

I, Robert Magaw, on oath say that I have read the foregoing bill of Complaint by me subscribed and know the contents thereof; that the allegations therein set forth as of my personal knowledge are true, and that those set forth upon information and belief I believe to be true.

ROBERT MAGAW.

Subscribed and sworn to before me this 4th day of Oct. A. D. 1907.

[SEAL.] HARRY T. PYLES,
Notary Public, Kings County, N. Y.

7 *This Indenture*

Made this 28th day of May in the year of our Lord one thousand nine hundred and seven, by and between Alice D. Magaw, widow, of the City of Washington, District of Columbia, party of the first part, and Amelia E. Huntley, Lydia H. Tilton, and Hettie H. Fague, Trustees, of the same place Parties of the second part:

Witnesseth, that the said party of the first part for and in consideration of the sum of Ten Dollars to her in hand paid by the said parties of the second part at and before the sealing and delivery of these presents, does grant unto the parties of the second part, their heirs and assigns as joint tenants, all those pieces or parcels of land situate in the City of Washington, District of Columbia, known as and being lots numbered Twenty (20) and Twenty-one (21) in John G. Ames and R. A. Morrison's Subdivision of part of Square Seven Hundred Fifty-eight (758) as per plat recorded in Book 13, folio 46, one of the records of the Surveyor's Office of the District of Columbia, together with the improvements, rights, privileges, and appurtenance to the same belonging.

To have and to hold the same, unto the use of the said parties of the second part, their heirs and assigns, as joint tenants, in and upon the following trusts, and none other, to wit:

First, in trust to permit the said party of the first part and her assigns to use, occupy and enjoy the hereinbefore described real estate and the rents issued and profits thereof to have and
8 take to and for her own use and benefit for and during the term of her natural life, and to enjoy the same during said period as fully and freely as though this conveyance had not been executed.

Second, and upon this further trust, that upon the death of the said party of the first part. to sell the hereinbefore described real estate either at public or private sale, in the direction of said Trustees, or the survivor of them, upon such terms and conditions, and if at public sale after such previous notice and advertisement as they, or the survivor of them, or the Trustee acting in the execution of this trust, may deem best calculated to accomplish the purpose of this trust, and to convey the same to the purchaser or purchasers by good and sufficient deed in fee simple. The purchaser or purchasers shall not be required to see to the application of the purchase money.

Third, and upon this further trust, that the proceeds derived from such sale or sales, after paying and deducting necessary expenses attending such sale or sales, shall be paid unto the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of the City of Washington, District of Columbia, and the receipt of the Treasurer of said Society shall be a sufficient discharge to said Trustees for the payment of said money. The money so paid to said Society shall be applied by them in their discretion in the erection of a building as a memorial to grantor's departed husband, Robert Magaw, and to grantor, Alice D. Magaw, to be used either for the purposes of a church, hospital, orphanage, mission home, school, or some other missionary purpose in
9 the discretion of said society, said building shall be erected either in China or India, and the character of said memorial, and the particular place at which it shall be located, shall be determined by the said society in its discretion. Such determination shall be conclusive and binding upon all parties.

And the said party of the first part covenants that she will warrant specially the property hereby conveyed, and that she will execute such further assurances of said land as may be requisite.

In witness whereof the said party of the first part has hereunto set her hand and seal on the day and year first hereinbefore written

ALICE D. MAGAW. [SEAL.]

Signed, sealed and delivered in the presence of:
E. B. LA FETRA.
C. M. FORREST.

DISTRICT OF COLUMBIA, *To wit:*

I, C. M. Forrest, a notary public in and for the District of Columbia, do hereby certify that Alice D. Magaw, widow party to a certain Deed, bearing date on the — day of May, A. D. 1907, and hereto annexed, personally appeared before me in said District, the said Alice D. Magaw being personally well known to me as the person

who executed the said Deed, and acknowledged the same to be her act and deed.

Given under my hand this 28th day of May, A. D. 1907.

(Signed) C. M. FORREST,
Notary Public, D. C.

10 OFFICE OF RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 3076, folio 215 et seq., one of the land records of the District of Columbia.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office this first day of October, 1907.

[SEAL.] R. W. DUTTON,
Deputy Recorder of Deeds, D. C.

11 *Separate Answer of Hettie H. Fague.*

Filed Nov. 21, 1907.

In the Supreme Court of the District of Columbia.

No. 27393. In Equity.

ROBERT MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY et al., Defendants.

Hettie H. Fague, one of the defendants in the above entitled cause, for separate answer to complainant's bill of complaint, or so much and such parts thereof as she is advised it is material for her to make answer unto, answering says:

1, 2 & 3. This defendant says that the averments made in the first, second and third paragraphs of said bill are, as this defendant believes, true, and for the purposes of this suit are admitted.

4. Answering the fourth paragraph of said bill this defendant says that it is not true, as averred in said bill, that she, with the other defendants therein named, procured the execution and delivery of the deed therein described by the said Alice D. Magaw; but, on the contrary, she states that she did not know of the execution and delivery of the said deed, or of the purpose of the said Alice D. Magaw to make the same, until she saw in the daily papers that such a deed had been recorded in the Land Records of the District of Columbia. Upon information and belief, she denies that said deed was procured to be executed by either of the defendants named in said paragraph of said bill. Said averment is denied in toto,
12 and this defendant will require of the complainant strict proof thereof. She admits that a deed was executed and delivered by the said Alice D. Magaw on the date, to the parties, and for the purpose stated in said paragraph of said bill; and upon information and belief she avers that the same was the voluntary act

and deed of the said Alice D. Magaw. She admits that said deed was recorded on the day named in said paragraph of said bill, and that the certified copy attached thereto is a correct copy of the original instrument. Defendant further avers that she nursed and took care of the said Alice D. Magaw for the period of twenty-two months prior to her death, with the exception of about one month, when defendant was disabled by sickness and was absent from the said decedent; that she took care of decedent day and night during that period of time; that during her attendance upon said decedent, she, the decedent, many times expressed to this defendant her gratitude for what she had done and was doing for her; that decedent never communicated to this defendant during her lifetime any purpose to remember her in her will or to otherwise compensate her for what she had done other than by the payment of her usual weekly wages. So far as this defendant is concerned, she admits that the same was a voluntary deed and without money consideration, and upon information and belief, so far as the other defendants are concerned.

5. This defendant admits that she and the other defendants named in the fifth paragraph of said bill are members of the Metropolitan Memorial Methodist Episcopal Church, and were such at the
13 date of said conveyance. She also admits that she and the other defendants therein named are members of the Woman's Foreign Missionary Society. She denies that there were any relations of intimacy or confidence existing between herself and the said decedent arising from her church and missionary relations. On the contrary she says that until she went to work for decedent, her relations were not intimate; that she had with her a speaking and friendly acquaintance and nothing more. Upon information and belief, she states that the same is true of all the other defendants therein named except the defendant Sarah D. La Fetra, who had known the decedent for a longer time, and was better acquainted with her than either this or the other defendants. She denies that there was on the part of herself, and either of the other defendants, any such relations of intimacy and confidence existing between them, or either of them and the said decedent, as would or did induce or influence the said decedent to make or execute either a deed or will contrary to her wish or purpose, as seems to be implied by this averment in said paragraph of said bill. On the contrary she states that said decedent was a woman of strong mind and will and purpose, and it was difficult to influence her in any way when she had decided upon any course.

6. Answering the sixth paragraph of said bill, this defendant says that she believes the age of decedent is correctly stated in said paragraph of said bill. She admits that the said decedent was in an enfeebled condition of body, and that her mind probably was not so alert as it had been in the earlier years of her life, but she
14 retained her intelligence up to a few days before her death, which was a number of weeks after the execution of said deed. She was in touch with her business affairs and transacted business subsequently to the execution of said deed, and the defendant denies that she was at any time prior to her death so enfeebled either in

body or mind as to be susceptible to influence exerted, or attempted to be exerted, upon her by others, and the defendant will require of the complainant strict proof of these averments. On the contrary she says that the truth is that she was a woman of remarkable intelligence and inflexible purposes, and not liable to be influenced by any person to do other than she desired.

7. Answering the seventh paragraph of said bill, this defendant says that she has already heretofore stated in this answer her connection with the execution and delivery of the deed in controversy in this case, and she hereby repeats the same, and states further that said averment in said paragraph of said bill is not only untrue in fact, but is wholly untrue as the complainant might have readily ascertained if he had made any investigation upon the subject. She denies that she took advantage of her close and intimate relations with the decedent, or that she in any manner procured her to execute said deed; but, on the contrary, the truth is that she knew nothing of its execution and delivery until it had been made and recorded, as hereinbefore stated.

8. This defendant, upon information and belief, admits the averments stated in said paragraph eight of said bill to be true, and further, upon such information and belief, she states that the
15 defendants named in said paragraph have the right to possession of said property, and to take the rents, issues and profits thereof by virtue of said deed; that they are not only justified, but it is their duty to refuse to permit the complainant or the heirs at law of said decedent to have said rents and profits.

9. Answering the ninth paragraph of said bill, this defendant denies that the said complainant and the defendants Freferick L. and Stephen Magaw are tenants in common of said property, and that they have been such since the death of the said Alice D. Magaw. She says that such averment is a conclusion of law rather than a statement of fact; that whether they are tenants in common or not depends upon the fact as to whether or not the said deed made by the said Alice D. Magaw, and delivered as aforesaid, was the act and deed of the said Alice D. Magaw, as it purports to have been or whether it was procured by fraud and undue influence.

10. Answering the tenth paragraph of said bill, this defendant denies that said deed should be set aside as fraud-lent and void, or that the same should be cancelled and set aside and so declared. On the contrary, this defendant says that from her own personal knowledge of the decedent, and from information and belief from other sources, said deed is a valid instrument; that it was executed by the said Alice D. Magaw to carry out the purpose formed by her some months before the execution and delivery thereof, and in consummation of a desire and purpose on her part formed without any suggestion on the part of this defendant, or any undue influence or suggestion from either of the defendants, or from any person whomsoever, and she believes, and therefore avers, that said
16 deed is a valid deed and conveyed unto the grantors in said deed a good and indefeasible title thereby.

And having fully answered, this defendant prays to be hence dis-

missed with her reasonable costs in this behalf most wrongfully incurred.

HETTIE H. FAGUE.

B. F. LEIGHTON,
JOSEPH R. FAGUE,
Solicitor- for Hettie H. Fague.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; that the facts therein stated of my own person- knowledge are true and that those stated upon information and belief I believe to be true.

HETTIE H. FAGUE.

Subscribed and sworn to before me this 12th day of November, A. D. 1907.

[SEAL.] WILLIAM H. DESHIELDS,
Notary Public, D. C.

17 *Answer of Amelia E. Huntley and Lydia H. Tilton.*

Filed Nov. 21, 1907.

In the Supreme Court of the District of Columbia.

No. 27393. In Equity.

ROBERT MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY et al., Defendants.

Amelia E. Huntley and Lydia H. Tilton, two of the defendants in the above entitled cause, for answer to complainant's bill of complaint, or so much thereof as they are advised it is material for them to make answer unto, answering say:

1. Answering the first paragraph of complainant's said bill of complaint, these defendants say that the averments therein contained they believe to be true, as therein stated, and for the purposes of this suit they are admitted.

2. Answering the second paragraph of said bill, these defendants say that they are residents of the District of Columbia, but they deny that they are trustees of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of the city of Washington, District of Columbia, as averred in said paragraph of said bill. Said statement is wholly untrue. They admit that they are members of an unincorporated society connected with said church, which was organized for the purpose of promoting the cause of foreign missions. The defendant, Amelia E.

18 Huntley, answering for herself, says that she is now, and has been for more than a year last past, Corresponding Secretary

of the Baltimore Branch of the Woman's Foreign Missionary Society of the United States, and of which the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church is an auxiliary society; that she is also chairman of the Committee on Bequests and Annuities of said Branch. These defendants admit that the defendant, Sarah D. La Fetra, is the president of said auxiliary society. They deny that the defendant, Lydia H. Tilton, is the secretary of said society, but she is now, and has been for more than a year last past, the Vice-President of said auxiliary society. The other averments in said paragraph of said bill contained are, as these defendants are informed and believe, substantially true, and for the purposes of this suit are admitted.

3. Answering the third paragraph of said bill, these defendants admit that Alice D. Magaw died at the City of Washington on the 10th day of August, 1907, at an advanced age. These defendants have no personal knowledge, and are unable to admit that she was 83 years of age, and that, while not doubting the truth or accuracy of such averment, they leave the complainant to make such proof thereof as he may deem material. The other averments made in said paragraph of said bill are, so far as these defendants are advised, substantially true as therein stated, and for the purposes of this suit and no other are admitted.

4. Answering the fourth paragraph of said bill, these defendants severally answering say that it is not true that they procured
19 the said Alice D. Magaw to execute and deliver to them and the defendant, Hettie H. Fague, as trustees of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of Washington, a deed conveying said property, or that they are, or either of them is, trustees of the Woman's Foreign Missionary Society of said Church, as stated in said paragraph of said bill. The defendant, Amelia E. Huntley, answering for herself, says that she did not know of the execution and delivery of said deed until after it was executed and delivered and recorded; that her first knowledge of it was from seeing an account of its recording in the daily papers, but she was informed by the defendant, Sarah D. La Fetra, that sometime, the date of which she is unable to fix, the said Alice D. Magaw intended to do something for the Missionary Society. The defendant, Lydia H. Tilton, answering for herself, says that she was told by the said decedent shortly before she executed and delivered said deed that she proposed making the same, and disclosed to her the purpose for which it was to be made. She denies that she urged or advised, or in any manner procured, the execution and delivery of said deed by the said Alice D. Magaw. On the contrary, she states that the execution and delivery thereof was wholly of decedent's own volition and her free act and deed. These defendants answering further, admit that said deed of conveyance vested the apparent legal title, and as they aver, the actual legal title as well as the equitable title in and to said lots in the said Amelia E. Huntley, Lydia H. Tilton, and Hettie H. Fague, not as trustees of the Woman's Foreign Missionary Society of
20 the *of the* Metropolitan Memorial Methodist Episcopal Church of Washington, as stated in said bill, but as trustees

of said property for the purposes as set out and disclosed therein. They deny that they caused said deed to be recorded in said City and District as set out in said paragraph of said bill. Said statement is wholly untrue. The said deed was recorded by the agent of the said Alice D. Magaw, who attended to the draft of the deed. The defendant, Lydia H. Tilton, answering for herself, says that she did not know of the purpose of Mrs. Magaw in placing said deed upon record. The same was done without her knowledge and she learned of it only after it had been recorded. These defendants, upon information and belief, state that said deed was a voluntary one, made without money consideration, as stated in said paragraph of said bill, but they aver it was one which said decedent was entitled to make if she so desired; that decedent was, as they are informed and believe, dealing with her own property, and she had the moral right and the legal power to dispose of it as she might deem best. The other averments in said paragraph of said bill are true and are admitted.

5. Answering the fifth paragraph of said bill, these defendants admit that they are members of the Metropolitan Memorial Methodist Episcopal Church of Washington, and also of the Woman's Foreign Missionary Society but they say that the said Alice D. Magaw was not a member of said Church but was of said missionary society. The defendant, Amelia E. Huntley, answering for herself,

21 says that her relations and associations with said decedent could not be truthfully said to be intimate; that she knew the decedent and sustained the relation to her that she did to many others, but they were not those of special confidence or intimacy; and that she never saw her more than twice during the last year of her life. The defendant, Lydia H. Tilton, answering for herself, says that she knew the decedent quite well, and was accustomed to call upon her about twice a month during the last year or more of her life; that her relations with her were not other or different from those which subsisted between herself and many other members of the Church; that there were no such relations of confidence and intimacy subsisting between them as would influence the mind or purpose of said decedent, had she desired or sought to have exerted such influence, as seems to be implied by this paragraph of complainant's said bill; and that such inference and statement is wholly untrue.

6. Answering the sixth paragraph of complainant's said bill, these defendants deny that the said Alice D. Magaw was, at the time of the execution and delivery of said deed, in an enfeebled condition of body and mind in the sense in which such averment is made. They admit that she was old and had the feebleness incident to her years, but she was able to walk about, was not confined to her bed, and that she was a woman of strong will and purposes. The defendant Amelia E. Huntley, answering for herself, says that decedent's mind was not enfeebled, as averred in said paragraph of said bill, but that she was in her usual condition of intelligence, and was not, at

22 the last time this defendant saw her, in such a condition as would render her readily susceptible to influence exerted, or attempted to be exerted upon her by others. On the contrary she states that she was a woman of clear purpose, knew her own mind,

fendant says that the defendants Amelia E. Huntley, Lydia H. Tilton and Hettie H. Fague are not trustees of the Woman's
26 Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of the District of Columbia, as stated in said paragraph of said bill. Said society has no trustees, and such averment is wholly erroneous. The said defendant Lydia H. Tilton is the first vice-president of said Society, and is not the secretary thereof, as stated in said paragraph. The other statements made in said paragraph are, so far as this defendant is advised, substantially true, and, for the purposes of this answer only are admitted.

Third. Answering the third paragraph of said bill this defendant says that the averments therein contained are substantially true, as she is informed and believes, and the same are admitted.

Fourth. Answering the fourth paragraph of said bill, this defendant says that it is not true that she procured said Alice D. Magaw to execute and deliver unto the defendants Amelia E. Huntley, Lydia H. Tilton and Hettie H. Fague, trustees of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of Washington, District of Columbia, a deed of conveyance of the property therein described. Such averment is wholly untrue, so far as this defendant is concerned, and upon information and belief, it is wholly untrue as to the other defendants named in said paragraph of said bill, and this defendant will require strict proof of said allegation. She says that said deed of conveyance to said property was the free and voluntary act and deed of the said Alice D. Magaw deceased, made of her own motion and without suggestion on the part of this defendant. She is
27 advised, and she therefore avers, that said deed vested not only the apparent legal title in and to said lots in the defendant Amelia E. Huntley, Lydia H. Tilton and Hettie H. Fague, as trustees of said property and not of the said Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of Washington, as stated in said paragraph of said bill, but said deed vested the actual legal title, as well as the equitable title, to said lots in said trustees. This defendant denies that said trustees caused said deed to be recorded in the Land Records of the District of Columbia, as stated in said paragraph of said bill. She says that the truth is, according to her information and belief, and she therefore so avers, that said deed was delivered by the said Alice D. Magaw unto Charles M. Forrest, Esq., her then agent, and that he placed the same, as the agent for the maker of the deed, on record in accordance with her express authorization and direction. This defendant admits that said deed was executed and delivered without money consideration being paid for the property therein described by the said defendants who are trustees therein, or by any person whomsoever.

Fifth. Answering the fifth paragraph of said bill, this defendant denies that the said Alice D. Magaw was a member of the Metropolitan Memorial Methodist Episcopal Church of Washington, D. C., but she admits that the said Amelia E. Huntley, Lydia H. Tilton

and Hettie H. Fague and herself are members of said Church, as stated in said paragraph of said bill. She admits that they, the said defendants, together with the said decedent, were members
28 of the Woman's Foreign Missionary Society of the said Church; but she denies that, because of such membership, there were any such relations of confidence or intimacy subsisting between herself and the said decedent, or between the said decedent and the other defendants named in said paragraph of said bill, as would influence the execution of said deed, as set out in said paragraph of said bill. Such statement is wholly untrue, and this defendant will require of the complainant strict proof of all of said allegations in said paragraph contained.

Sixth. Answering the sixth paragraph of said bill, this defendant denies that the condition of either the mind or body of the said Alice D. Magaw was such as to render her readily susceptible to influence exerted or attempted to be exerted upon her by others. She says that such statement is wholly untrue and she will require of the complainant strict proof thereof. She avers further that the truth is that the said Alice D. Magaw was a remarkable woman for her age. Said decedent boarded with this defendant for a number of years prior to her death; that she went about the house and sat up most of the day until within a short time prior to her death; that she was a woman of remarkable strength of mind and firmness of will, and could not be readily influenced by others.

Seventh. Answering the seventh paragraph of said bill this defendant says that it is not true that she, with the other defendants named in said paragraph of said bill or with any other person or persons, procured the said Alice D. Magaw to execute said deed without the knowledge of said heirs at law, and thereafter
29 placed the same on record. Such averments is wholly untrue, and this defendant will require of the complainant strict proof of all the allegations in said paragraph contained. On the contrary, she says that truth is, that prior to the execution and delivery of said deed the said decedent had added a codicil to her will, on the 21st day of February, 1907, for the purpose of accomplishing the same object that she sought to effect by the execution and delivery of said deed. This defendant answering further says that so far as she knows, and to the best of information and belief, the execution and delivery of said deed was wholly the free act and deed of said decedent; that its execution and delivery was not procured either by her, or by any other persons or person, for the purpose of cheating or defrauding the heirs at law of said decedent out of their share of her property. Said averment is wholly untrue, and defendant will require of complainant strict proof of all of said allegations.

Eighth. Answering the eighth paragraph of said bill, this defendant says that the trustees under said deed, and as trustees thereof for the purpose therein stated, and not as trustees for the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of Washington, as stated in said bill, are in possession of said property. She admits that they claim to be the ex-

clusive owners thereof for the purposes set out in said deed and that they refuse to permit the complainant or other heirs at law of said decedent to have the rents or profits thereof. She is advised, and therefore avers, that the heirs at law would not be entitled
30 to said real property in any event, and especially that the complainant would not be so entitled; that the said real estate but for the execution and delivery of said deed as aforesaid, would have passed and did pass, under the will of the said decedent, which has been filed for record in this court sitting as a probate court to the residuary devisee therein, to wit, the defendant Van Brunt Magaw. Wherefore, defendant says that complainant has no interest in said real estate as decedent's heir at law or devisee under the will, and has no right to bring or maintain this suit for the cancellation of said deed.

Ninth. Answering the ninth paragraph of said bill, this defendant states that the averment that the said Van Brunt Magaw, Frederick L. Magaw and Stephen Magaw are tenants in common of said property, and have been since the death of Alice D. Magaw, is a conclusion of law and not a statement of fact, and she is advised it is not necessary for her to specifically answer such averment, but she says, upon information and belief, that they are not tenants in common of said property, nor have they been since the death of the said decedent; that they have no right, title or interest therein; that the title to said property became, and was vested in the said defendants Amelia E. Huntley, Lydia H. Tilton and Hettie H. Fague, by virtue of said deed executed and delivered by the said decedent prior to her death, as hereinbefore stated. Defendant admits that the defendants Van Brunt Magaw, Frederick L. Magaw and Stephen Magaw are made defendants, but she has no other information than is stated in said paragraph as to why they are
31 made defendants instead of joining the complainant in the bringing of said bill, and she leaves the complainant to make such proof thereof as he may deem material.

Tenth. Answering the tenth paragraph of said bill, this defendant denies that said deed should be set aside as fraudulent and void. On the contrary she says, to the best of her information and belief, said deed is valid in all particulars and ought not to be cancelled or declared void.

And having fully answered, this defendant prays to be hence dismissed with her reasonable costs in this behalf most wrongfully incurred.

SARAH D. LA FETRA.

B. F. LEIGHTON,
Solicitor for the Defendant, Sarah D. La Fetra.

District of Columbia, ss:

I do solemnly swear that I have read the foregoing and annexed answer by me subscribed, and know the contents thereof; that the facts therein stated of my own personal knowledge are true, and that those stated upon information and belief I believe to be true.

SARAH D. LA FETRA.

Subscribed and sworn to before me thid 20th day of November, A. D. 1907.

[SEAL.]

JAMES F. SMITH,
Notary Public, D. C.

32

Order Pro Confesso.

Filed Dec. 10, 1907.

In the Supreme Court of the District of Columbia.

Equity. No. 27,393.

ROBERT MAGAW
vs.
AMELIA E. HUNTLEY et al.

It appearing to the Court that the summons issued has been returned not found as to the non residents herein to-wit: Van Brunt Magaw, Frederick Magaw, and Stephen Magaw and it further appearing to the court that due publication has been had against said defendants, it is this 10th day of December A. D. 1907 adjudged and ordered that a decree pro confesso be and hereby is taken against the aforesaid defendants, Van Brunt Magaw, Frederick Magaw and Stephen Magaw.

ASHLEY M. GOULD, *Justice.*

33

Transcript of Evidence.

Filed Nov. 10, 1909.

In the Supreme Court of the District of Columbia.

No. 27393. In Equity.

ROBERT MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY et al., Defendants.

Testimony on Behalf of Complainant.

Met pursuant to agreement of counsel, to take testimony for and on behalf of the complainant in the above entitled cause, at the offices of B. F. Leighton, Esq., Columbian Building, Washington, D. C., Tuesday, December 17th, 1907, at ten o'clock a. m.

Present: The complainant Robert Magaw, the defendants, Amelia E. Huntley, Lydia H. Tilton, and Sarah D. La Fetra; Francis Stockton McDivitt and E. Hilton Jackson, for and on behalf of the complainant; B. F. Leighton, for and on behalf of the defendants, Amelia E. Huntley, Lydia H. Tilton, and Sarah D. La Fetra; and

B. F. Leighton and Joseph R. Fague, for and on behalf of the defendants, Hettie H. Fague; the Examiner and witnesses.

Whereupon, the complainant ROBERT MAGAW testified as follows:

34 By Mr. McDIVITT:

I reside in Brooklyn, N. Y., 1429 Ocean Avenue. I am the complainant. I was a grandson of Alice D. Magaw. She died August 10th, 1907, at La Fetra Hotel, Washington, D. C. She left her surviving two sons namely: Van Brunt Magaw and Frederick L. Magaw, and seven grandchildren. Another son, John D. Magaw, who was my father, died in 1900 leaving two children, namely: Stephen Magaw and myself, both of whom are now living. She left some other grandchildren, being children of her son Van Brunt Magaw, namely: Alice Davenport, Sarah Lennington, Clara, Mabel, and Edna. I can't remember the middle names. Alice D. Magaw's age at the time of her death was 83, I believe. She had lived in Washington at the time of her death, some 15 or 17 years. Before she lived in Washington she lived at home in Brooklyn, with my father 1423 Ocean Avenue; that was after my grandfather's death. Mrs. Magaw's husband's name was Robert Magaw; he was my grandfather; he was the person for whom I was named; he died in 1886 or 1887. Mrs. Alice D. Magaw and my grandfather, Robert Magaw lived together forty odd years and until his death, at the old Town of Flatlands, Kings County, N. Y. He was a farmer all his life. They were members of the Flatlands Dutch Reformed Church and were both very active members. My grandfather was a member of the Great Consistory. He served as an officer of the church in many ways and at many times. He always took very strong interest in church matters and seemed to be very active in its work. My grandmother was a teacher in the Sunday School, had a class there for a number of years and was always very active with the ladies of the church in work-
35 ing for the church and helping. My grandfather was never a member of any other Church, not to my knowledge,—perhaps the Graves End Church, but it was years ago. The Graves End Church was Reformed Dutch. Alice D. Magaw never severed her connection with the Flatlands Dutch Reformed Church so far as I know. During the years that Mrs. Magaw resided in Washington she visited her children and grandchildren in Brooklyn occasionally and wrote letters to them, and they visited her in Washington. I don't know when she wrote last to me or my family; it was previous to her being stricken with this disease, whatever it was, along in 1905, I should think. I don't think she wrote me or my family any letters during the last two years of her life. She visited my family last in Brooklyn during the summer of 1905; she went away in August, I think it was. I visited Mrs. Magaw in Washington, just a year ago this month, December, 1906; I had visited her before in Washington. My uncle Van Brunt Magaw, was with me, and we called to Washington to see Mrs. Magaw. She was ailing. We came to the La Fetra Hotel and went up to the desk, and they

told us to go to Mrs. Magaw's room. I had been there before and knew where the room was. We went up and knocked on the door. The door was opened by the nurse, the defendant Miss Hettie Fague. The nurse seemed pleased to see us. Grandmother was sitting there in the chair. Miss Fague said, "Here is your son, Van Brunt, and your grandson, Robert." She just looked toward where we were, nodded her head, said "Yes", and smiled. Then we walked to her and greeted her. She got up out of the chair and we shook hands
with her, but she did not appear to know who we were or
36 make any showing of affection, or that she was anxious to
see us or glad to see us. The date of this interview was just about a year ago. I don't know the exact day of the month. It was the week before the holidays last December. Well, she didn't—I don't know how to express it. Why, she didn't carry on general conversation as—I asked her how she was feeling. She just nodded her head, laughed, and was all the time pulling up her skirts and rubbing her dress like that (Witness indicates). She looked at us, and I asked if she knew me. She didn't say yes or no. She just looked and said, "You are my promise", and I asked her if she didn't want to know about my wife and children, calling them by name. She did not mention any names whatever and did not appear to grasp what I was asking her. We were sitting there, she got up, pointed out the window and said "Spirit". I looked, but did not know what she meant. I said, "Spirit! Whom do you mean, the people?" She would say "Yes". I saw her the next day, the next morning, when we went in to see her. We went to bed and next day we went in to see her. I remember my uncle went out and bought some Christmas wreaths to hang in the window. Miss Fague and I arranged strings on them so they could be hung in the window. We hung them up and called her attention to them. She said "yes, the spirit", but did not make any showing that she appreciated what we did for her. I do not think that she ever addressed any conversation to me unless she was spoken to, although she had always been very affectionate toward me. Mr.
Van Brunt Magaw bought other things for her; we went
37 down the street and he bought one or two of these radiom-
eters from the optician's store. He bought them to take home, but he thought that while we were there they might be of some interest to her. We brought them in and set them on the table in her room in the sun. As soon as the sun would strike them they would spin around. He called her attention to them. He said, "See these radiometers." "Do you know what they are?" While we were there Mrs. Magaw tried to talk. She didn't say very much of anything. Her sentences were disconnected. She would say one or two words, then she would appear to become confused. She could not express herself, could not articulate her words. She would say, "How is my promise", or "See the spirit"; sentences to that effect. She didn't just say it once while I was there, it would be all the time. She attempted to talk several times while we were there, I mean she only tried to talk several times in an hour. She would try to talk to us, but she did not make much out

of it. It was disinteresting, nothing intelligent. I tried to talk to her; I asked her how she was getting along, how she felt; she didn't really know. I asked her if she could not call me by name, but she did not say it, she just said "Yes, yes, I know, my promise", but that is as far as she would get. I don't know the general conversation of my uncle Van Brunt Magaw. It was the same as mine, addressing her and trying to get her to talk. He would talk and she would try to talk.

Q. Well, did she or did she not say anything that you could understand? A. Do you mean a complete sentence? We
38 would always have to guess and try to find out what she meant; otherwise I don't remember that she did.

Q. Did she show any annoyance at anybody or anything? A. Why, when she was trying to talk, she would say, "Why is it? Why is it? I can't," and then sit back in her chair and not make any attempt. The nurse would say, "What is it, darling? What are you trying to say?" trying to help the woman out. She would throw up her hands like that (witness indicates by waving his hands), shake her head and try to make an expression.

The nurse, Miss Fague, talked while we were there continually to my uncle and I. She would try to help my grandmother out in order to make us understand what she said.

There were portraits or photographs on the walls of Mrs. Magaw's room; I believe my children were there, Alice and Margery these two are dead. The other one was Melford, he is now living. Mrs. Magaw had seen two of these children,—I think she had seen them all. She didn't ask about them, she didn't ask after my wife; she didn't try to read anything or look at anything. I tried this time to see if she could see. I asked Miss Hettie if she had a reading glass, or could use a reading glass. Miss Hettie said, "No, she can't use it, her sight is too far gone." I didn't make any further attempt. Miss Fague told me that she read to Mrs. Magaw from the Bible, and I presume, the newspaper. The letters that were sent to her from her family she would read to her, and Miss Fague would reply to the letters in her own handwriting and sign herself
39 as Mrs. Magaw. Miss Fague said that Mrs. Magaw didn't understand what she was reading at times. She (meaning Mrs. Magaw) didn't pay any attention to her.

Referring to Mrs. Magaw's attempts to talk while we were there, I can remember the words, but it is pretty hard to put them together the*y* way she used them. I remember one time we were called for luncheon or dinner. Miss Fague said, "Come, Mother Magaw, dinner is ready." She did not get up. Van Brunt and I started for the door. She said, "Oh, come to the promise," or something to that effect. She got started out the door, and found her way right to the dining room, and came in. All were seated at the table with Mrs. La Fetra. She would not carry on any conversation or do any ordering. The nurse had to do it all for her. There was conversation among myself and Mr. Van Brunt Magaw and Miss Fague at the table; we would carry on a general conversation while we were eating. I never heard Mrs. Magaw address Miss Fague or call her by name, except to say "Where is she." I think she asked me if

the promise was good. I was there the next day when Dr. Custis came. There were present also, Van Brunt Magaw, Grandmother, and Miss Fague. This was the second day I was at Washington at this visit. The Doctor came to the door and came in. I believe he knew my uncle, went over and spoke to him. I was introduced to him by the nurse. He went over to Grandmother and said, "How do you do today?" sat down there for a minute or so. She would look at him, laughed and appeared to be more cheerful. I remember she called him, "My promise." She sat there facing him, pulling her skirt, fumbling with her skirt all the time. The Doctor
40 asked her, "How are you today?" She just looked at him and smiled. The expression of her face when she laughed appeared to be not an intelligent expression, kind of blank. The Doctor was there ten or fifteen minutes. I don't remember that he talked with Miss Fague. I think it was when the Doctor was about to leave that she said, "my promise, my promise." She faced the Doctor when he was sitting there. When she said "my promise" she was not looking at anyone particularly. I don't know who had been talking last when she said that. I think I asked her if that was her doctor. I can't remember the date when I visited Mrs. Magaw next before the visit I have described. I think I was there in the winter of 1904, that is, my wife and I. That is before she was taken sick. There was a difference in her manner and talk at that time. She talked to me very intelligently. She would come to us and greet us. In greeting us she put her arms around us and kissed us, tried to make us as welcome as possible, and make it interesting for us. She always asked about all the family and named each one individually. There was nothing which might have caused an estrangement between Mrs. Magaw and myself, or my family, between the two visits I have described.

She was wholly incapable of attending to any of her own business on the occasion of this visit in December, 1906. She was under the constant care of a nurse and had been for sometime previous to that.

Answer objected to on the ground that no proper foundation had been laid for the opinion of witness.

41 Cross-examination.

By Mr. LEIGHTON:

The money that bought the property that Alice D. Magaw owned came through her husband's estate. My grandmother, Mr. Magaw, owned property. He made a will, and the property was her part of the provision that was made for her by his will. My grandmother's name is still on the books of the Dutch Church of which she was a member. She never joined any other church to my knowledge. She never lived with me after the death of her husband. She lived with my father before my marriage; I imagine one or two years, more or less. After that she did not live with my father, and she never lived with me, in my own house. I don't know how old I was at the time she lived with my father; I was around; I was not a man-grown. I am named for my grandfather. My grandmother came here to live of her own accord, of her own

volition. She had lived with members of her family up to the time of her coming here, and decided to make this her home, and came here and lived for 15 or 17 years.

Referring to my visit in 1904, she was a very intelligent woman,—in my way of describing it. She was a woman of force of will when she was herself; a woman that had decided views on what she wanted to do and what she did not want to do. When she determined upon her course of conduct it was difficult to turn her from that purpose; that was always one of her dominating characteristics. When I visited her a year ago I boarded at the La Fetra Hotel. We stayed there one night I believe. We came this afternoon and went
42 home tomorrow afternoon. Probably 24 hours. She had been in the hotel 12 or 15 years, I believe—10 years or so. I had visited here there before; I think I had been there twice. I don't know whether I had been there twice in all the time she was there before this visit in December. I called to see her when she was at Mrs. Williams'. That was previous to her going to the La Fetra Hotel. Speaking of the time she was at the La Fetra, I say twice, I don't recall the other visit, only that one. Both times I was there I stopped at La Fetra's. My grandmother in my visit of 1904 and 1905 was all right and competent at that time to make a valid deed or will. I happened to come here in December, this last time. My uncle came to my house—he lives across the street from me—and asked me if I would not come to Washington with him. He was coming down to see if he could not arrange some way to have grandmother's business taken care of and see how she was. I presume he received word from Mrs. La Fetra. I don't know. My grandmother made a will which bears date the 24th day of September, 1895, and which has been lodged in the Probate Court of this jurisdiction for probate and record. I don't contest the validity of that will, the body of the will. I think that is a valid will. I have caveated the codicil to it, but not the will itself. That will makes me a beneficiary to the extent of three thousand dollars, and that is all the interest I take under the will. It makes another provision for me, indirectly through my father. I presume it is true that she has personal property enough to pay all the legacies, I don't know. The executor is my uncle. When I last saw my grandmother I can't say that she knew what she desired to say or that her
43 difficulty was in finding words to express what she wished to say. I don't know what she was suffering from. I didn't consult with her attending physician as to what was the trouble. My grandmother seemed to know where the dining room was and had intelligence enough to go there without any assistance. She had been going there for 10 or 12 years. She could not make herself known as to what she wanted to say. I don't know whether she knew herself what she desired.

Q. Didn't her impatience, apparent impatience, and her gestures, were they not occasioned by the fact that she knew what she desired to say, what thought she desired to express, but was unable to think of the right word to express it with? A. I can't say that I do. No. I don't know whether that was the reason or not. I don't know.

I was with her at the last interview, I suppose, an hour, and that is

as long as I was with her the last time I was in the city, the last time I saw her alive. I know that her relations with her husband were affectionate and that she thought much of him and his name. I am named for her husband, and I believe that probably is one of the reasons why I am given a legacy in her will, because of the fact that I bear his name. I was not on to the funeral at Washington. The last time my grandmother wrote to me was before she was taken sick. I have not got the letter. I don't remember how long before she was taken sick. I never preserved the letters. She was always very regular in writing up to that time. When I speak about her being taken sick I refer to September, 1905. Prior to that time she used to correspond with me at least once a month. It was not
44 convenient for her to stay at our house. She always stayed with my uncle, but she would come over and spend the day with us. She never spent any length of time at my house, never stayed over night. I did not know anything about the execution of this deed or codicil. The deed and codicil were both read to me after her death by Mr. Forrest in his office. I did not say to Mr. Forrest at that time that the codicil was like my grandmother and that I was not surprised at its provisions. I may have made the remark. I don't recall what I said at that time, any remark that I made. I do not say that I did not make that or a similar remark, I don't recollect it. My uncle, Van Brunt Magaw, was with me.

Q. Didn't he say that it was her will, that while it was hard it was her will and he wanted to see it carried out, as he expected his own will carried out?

By Mr. JACKSON: I object to that as hearsay testimony.

By Mr. LEIGHTON: Did he make that remark or a similar remark at that time?

A. He made some remark to that effect. I don't remember the words that he said at the time.

Redirect examination.

By Mr. McDIVITT:

I was asked about the length of time I spent with my grandmother the last time I was in the city, and I said one hour, more or less. That was the last day we were in there. I then said that the last time I was in the city, I mean the last day I was here,—we were
45 here parts of two days and one night. We came this afternoon and went home like tomorrow afternoon. I have forgotten just the exact time we were here. I know it was over night. I was asked whether I believed Mrs. Magaw to be competent to make a valid will in the years 1904 and 1905, and I have stated that she was taken ill in September, 1905. I do not mean that she was competent to make a last will and testament during that part of 1905 extending from the time she was taken ill until December 31st.

She never stayed over night in our house in Brooklyn because our house is small and we didn't have accommodations for her. My house, in relation to my uncle Van Brunt Magaw's house in Brooklyn, was diagonally across on the other side of Ocean Avenue; the two houses were 500 or 600 feet apart.

Referring to the reading of the will and codicil at Mr. Forrest's office, I can't recall any remark that I made. I may have made some remarks or said something as a joke, to laugh it off. I believe Mr. Forrest brought the papers out of the desk, safe or something or other, and said, "Gentlemen, would you like to hear the will read?" I believe my uncle said yes. Mr. Forrest said, "I suppose you know there has been a codicil added". I looked at him in amazement, as I didn't know it. Mr. Forrest opened the papers and read them, and made some remark. My uncle asked him about the houses on, whatever street it is, and which are referred to in the codicil and deed. "Oh," he says, "You people have nothing more to do with them. They have been deeded away." And then, I believe, he proceeded
46 and read the will.

Q. I ask you to recall and state for the record as fully and fairly as possible just what you said to Mr. Forrest on the occasion referred to about the will or codicil? A. No, I can't recall any remark I made, either jokingly or seriously.

Oh, I might have said, "well, it's all right." I had seen Mr. Forest only once or twice before that for a few minutes in his office. I was introduced to him a year ago this month, when I came down to see about her matters. That was the first and only time I had ever seen him until after the death of Mrs. Magaw. I know that Forrest was the agent of Mrs. Magaw at that time, and that all of her business was being transacted by Mr. Forrest. I believe he was given her business just previous to December, 1906.

Whereupon KATIE A. LEWIS, a witness of lawful age, called for and on behalf of the complainant, was duly sworn and testified as follows:

I reside at the Portner, 15th and U Sts. N. W., Washington, D. C., Apartment 142. I have resided in Washington four years and a half. I resided formerly at Swarthmore, Delaware County, Pa. When I first came to Washington I resided at 704 10th St., N. W., and was employed in Washington at Woodward and Lothrop's in the China Department. I was acquainted with Mrs. Alice D. Magaw in her lifetime. I remember when I first met her. I don't remember the date. I met her at the table several times when I lived
47 at the hotel. At the table where the family all sat, in the dining room at the La Fetra Hotel. It was when I had my meals there in 1906. I was employed at the La Fetra Hotel, 1st of March, 1907 to the 1st of August, 1907. My work was that of housekeeper. I met Mrs. Magaw and saw her frequently at that time and observed her actions and her expressions. I heard her pass a few remarks when I was in the room, and she talked occasionally. Her room was on the fourth floor at the corner of 11th and G Sts. One of those rooms. Rooms 44 and 42. My duties did not require me to go into her room,—not as housekeeper, they did not. Her maid, Miss Fague, occupied Mrs. Magaw's room while I was in the hotel. Mrs. Magaw seemed to be pretty good physically. At times she was stronger than at other times. I did not talk with her very often. I used to go in and read to her sometimes, and then I would talk to her. Nobody asked me to go and read to her. I have been in the

room when Mrs. Magaw and Miss Fague were there together. Miss Fague and myself were there. I used to hear Miss Fague read the newspapers, lessons from the prayer book, and I have heard her read the Bible to her. At those times Mrs. Magaw did not make any comments or say anything at all, unless it was to stop her and ask her to read it over. Mrs. Magaw at those times used the words "promise", "spirit", "kingdom", and she used to say "in the morning" when she meant "in the spring" and the word "apostle". This was all during the time that I was employed in the hotel as housekeeper. I was employed as Mrs. Magaw's attendant. That employment began, I think, from the 29th of January, 1907,—I am not positive. It was the time Miss Fague went away. My employment began the 1st of March, with the hotel proper. I was employed by Mrs. Magaw
48 before I was employed by the hotel. My employment as Mrs. Magaw's attendant began, I think, the 29th of January, 1907 and continued until the 1st of March, 1907. During that period I was with Mrs. Magaw a good deal of the time. I used to go to the hospital in the afternoon to see Miss Hettie H. Fague, one of the defendants in this case. She was ill at the hospital. Referring to my duties as attendant for Mrs. Magaw, I bathed her in the morning, dressed her, combed her hair, brought up her meals, read to her, and kept her room straightened up. I slept in her room; during that time she did not talk to me. Oh, she said just little things. She tried to say some things, yes, tried to tell us things about the folks in Brooklyn. She told us about the trouble she had had in the family, but she did not seem to be able to say what she wanted to say. The trouble was some lawsuit. She did not use the word lawsuit. She said the word "trouble". Then she would use the word "promise." If you were cleaning up things, she would say, "You know the "promise" and we could guess what she meant. If you asked her what it was, she would say "yes." Other expressions that she used were "kingdom", and "service". She would say, "Is the kingdom coming?" She may have meant me or her granddaughters. In referring to myself, she would probably say, "Give me that kingdom", or she would speak of me as "kingdom." She was not able to dress herself; she tried sometimes and was not able to get her waist or skirt on. During the time I was with her there was no swelling in her feet that I remember noticing. She did not read; she did not do any writing; she signed her checks and that was all. Re-
49 ferring to how she occupied her time, generally she would sit and look out of the window and walk around the room. She would not talk about anything out of the window unless it was a cloudy day and the sun came out, when she would say, "See it." She did not talk about her food. The first time I ever saw Mrs. Magaw, she pushed her soup aside and she called it the "apostle." It was in the fall of 1905, after she had recovered from the first attack. She would call different things, using the same words she used with everything, such as "apostle" "kingdom", "promise". She referred to people by such names, she may have meant her grandchildren, Mr. Forest or any of us. I don't know whether she ever used those words when Mr. Forrest was present. I do not recall.

Q. You say she used various words. Didn't she try to put them into sentences? A. She could not do it.

Q. How did she try to do it? You see we want what Mrs. Magaw did, how she acted or what she tried to do? A. Mrs. Magaw could not give a full sentence unless she used one of those words.

Q. What words? A. Promise or kingdom, and then she would say she could not get the word out. That condition of Mrs. Magaw continued from the time I became her attendant in January, 1907 until her death. I have seen her sign her checks. She signed her checks when Mrs. La Fetra would bring the bill up there. I was with her one month. The bill was due. Mrs. La Fetra brought it up and Mrs. Magaw signed the check. Mrs. La Fetra prepared
the check. Mrs. La Fetra did not say anything about the
50 check, not to my knowledge. I do not remember whether
she showed the bill to Mrs. Magaw. I didn't pay much attention to it. She di- not show the bill to me. There was no talk about it. She did not explain the matter to Mrs. Magaw, not to my knowledge. She said to Mrs. Magaw, "This is your bill". I do not recall that she told Mrs. Magaw the amount of it. I didn't pay that much attention to it. I have seen Mrs. Magaw sign one or two checks. I never saw her do any other writing. She signed her name, Alice D. Magaw, on a table; it was on a little table which she used to have her tray set on for her meals. She wrote slowly. Mrs. La Fetra was present when she signed. Mrs. La Fetra took the check when it was signed. It happened the same way every time I saw a check signed by Mrs. Magaw, Mrs. La Fetra always took it. I left Mrs. Magaw and took charge of the house as housekeeper on the first day of March, 1907. I left the hotel on the 7th of August, for my vacation and received a letter while away that my services were no longer needed, as much as that, and Mrs. Magaw died on the 10th of August, a few days afterwards. At no time during the period mentioned (January 1907 to her death), did Mrs. Magaw utter a sentence which I could understand without questioning her. I remember the occasion of some visits of Mrs. Magaw's relatives. When I was with her, Mr. Frank M. Smith and his wife, who are the grandchildren, Miss Mabel Magaw, Clara Magaw, Mrs. Van Brunt Magaw, and Mr. Van Brunt Magaw visited Mrs. Magaw, I was in the room when the relatives were present. I was present so that I could hear the conversation. I would spend the evenings
in there. Mrs. Magaw very rarely said anything. I was not
51 there when they first came in and I did not see how she
greeted them. The girls came down one time, and I happened to be in the room when they came up, I mean Clara and Mabel Magaw, grandchildren. Mrs. Magaw did not talk to them at all, that I can recall. She did not call them by name, she was told they were Clara and Mabel. I really don't recall what she said when she was told that. She stood up, shook hands with them, and kissed them; the girls kissed her. She was told it was Clara and Mabel, and she knew they were grandchildren.

Q. What did she do to indicate that she knew them? A. I can't answer that, I imagine that she knew them. She seemed to realize

that it was Clara and Mabel. She asked how the folks were. She did not call these granddaughters by name, or any of the relatives by name unless she was told first who they were. When she wanted to call my attention she just said "Come here." She never gave me any special name. I do not remember the occasion when Mr. Frank M. Smith and his wife visited Mrs. Magaw, I was at church that morning. I came home from church to go upstairs, and they were coming out. I met them in the hall. I was not in Mrs. Magaw's room while they were there, I met them coming out. I remember the time when the codicil to Mrs. Magaw's will was executed, the 21st day of February. I remember the occasion, I was a witness to that codicil. I signed my name as a witness. Mrs. Sarah D. La Fetra called me into Room 38 to sign it. She said they were doing something for Hettie. My conversation with Mrs. La Fetra was
nothing, she asked Mrs. Love and Miss Love, and they would
52 not do it and then she turned around and asked me, there
was no conversation in my presence and Mrs. Love's presence. Mrs. La Fetra simply said to Mrs. Love that Mrs. Magaw was doing something for Hettie, she asked Mrs. Love to come in and sign, and Mrs. Love said that she would rather not. Mrs. Love just simply said, "I'd rather not," as near as I can recall; I don't remember that Mrs. Love's daughter said anything. Mrs. La Fetra asked me if I would do it. I said "yes". There were prsent in the room when I went in, Judge Doane and Mr. C. M. Forrest, and I went in with Mrs. La Fetra, she went in with me. This was Mrs. Magaw's room and Mrs. Magaw was present. Mrs. Magaw was sitting at a table. I don't recall what was said. I was asked to sign my name in the presence of the others, and I saw them sign, Mr. Forrest, Judge Doane, Mrs. Magaw and myself. Mrs. La Fetra requested me to sign. I supposed this paper was an addition to her will for Hettie. Mrs. La Fetra said she was fixing something for Hettie. I supposed that it was an addition to her Will, not from any former conversation about it, but only that I knew she wanted to do something for Hettie. I had heard Mrs. Magaw say that time and time again, she could not say Hettie. She said "Ettie". I heard her say that often. The paper was not read over to me, the paper was not read over at all, not to my knowledge. Mrs. Magaw did not tell anybody what the paper was, not to my knowledge. I never had much conversation with Mrs. La Fetra. I did not bother that much about it. I knew that Mrs. Magaw wanted to do something for Hettie, and I paid very little attention to it, in fact, I very seldom gave it a thought afterwards, until it was brought up, I never heard Mrs. Magaw speak
of a missionary society, she never spoke of foreign missions
53 to me, so far as I recall. I have given all the conversation
that I can. I think I have given all the talking that Mrs. Magaw did while I was there. Miss Fague did not at any time in my presence and in the presence of Mrs. Magaw say anything about property generally, she was saving her money for a home, she wanted a home that was her own, some day. That was the general conversation. I have heard her say it several times in the presence of Mrs. Magaw, right there in the room. Mrs. Magaw did not make

any response at all to these suggestions. During the time that I knew Mrs. Magaw some days she was stronger than other days.

Q. Was she in your opinion during this period a positive character? A. Well, if she made up her mind to do anything, she would do it, and if she did not want to do it, she didn't do it.

Q. During the time you knew her was she strong-willed? A. Yes, she was strong-willed. The things I referred to that she made up her mind to do were if she wanted to go down to meals and things like that. If she did not want to go, she would not go, if she had her mind on anything she wanted it done, if she wanted things fixed for Hettie she worried about it until it was done. She woke me up one night and said she wanted it attended to.

Q. How did you know from what Mrs. Magaw said what she meant? A. She said she wanted to fix something for Ettie, as near as I can recall it.

Q. Those are the words she used? A. Do something for
54 Ettie or fix something for Ettie. She never said what it was, she wanted the paper (referring to her Will) and looked for it in the desk drawer.

Q. Did she say what paper she wanted? A. Just wanted the paper.

Q. Did you ask her what paper she meant? A. I do not remember whether I did or not. I know the handwriting on the check shown me, the handwriting is that of two people, Edwin S. La Fetra and Mrs. Alice D. Magaw. The signature is that of Alice D. Magaw; the part written by Edwin S. La Fetra is "E. S. La Fetra," and "Twenty-one Dollars."

By Mr. McDivitt: I now offer in evidence the check identified by the witness, and ask the Examiner to mark the same for identification "Complainant's Exhibit No. 1."

By Mr. Leighton: I object as being irrelevant to the issue we have here and immaterial.

(Note) The Examiner has marked the check as requested by Complainant's counsel "Complainant's Exhibit No. 1", and the same is hereto attached.)

By Mr. Jackson:

Q. Miss Lewis, I hand you for identification checks with lead pencil numbers from 2 to 30, inclusive, 32 to 40, inclusive, 45, 46 and 47, 49, and 53 to 56, inclusive, and 58, and ask you to look over those checks, and after having looked over them, state, if you know, in whose handwriting the body of all those checks is
55 written, and in whose handwriting the signature is.

(The witness takes the checks and examines them)

A. Mrs. Sarah D. La Fetra and Mrs. Alice D. Magaw. The body of all these checks is in the handwriting of Mrs. La Fetra and the signature is in the handwriting of Mrs. Magaw. I know the handwriting of Mrs. Magaw and Mrs. La Fetra.

Q. Now, look at checks numbered in lead pencil 31, 42, 43, 44, 48, 50, 51, 52 and 57, and state, if you know, in whose handwriting the checks are with the exception of the signature. A. The body

of the check is in the handwriting of E. S. La Fetra, and the signature, Mrs. Magaw's.

Q. Is that Edwin S. La Fetra who is a son of Mrs. La Fetra? A. Yes. I am familiar with his handwriting, the check numbered in lead pencil 43, is in the handwriting of Mrs. Sarah D. La Fetra, and the signature is Alice D. Magaw's.

By Mr. JACKSON: We offer all those checks as identified by the witness in evidence under the numbers that have already been set forth, and ask the Examiner to so mark the same as Complainant's Exhibits.

(Note.—The Examiner has marked the checks, as requested by complainant's counsel, Complainant's Exhibits Nos. 2 to 58 both inclusive, and the same are hereto attached.)

Cross-examination.

By Mr. LEIGHTON:

I felt very much hurt when I got notice that my serv-
56 ices were no longer required in August while I was away. I was not mad at all. I was hurt to think that Mrs. La Fetra would wait until I got out of the city. She sent me a letter after I went away on my vacation. I received a notice from her that my services were no longer required, not just that way, but it meant that, however. I interpreted that to mean that my services were not required in the fall, I have not got that letter here, but I have it, I will produce it if necessary. I do feel hurt, naturally. That was the only home I had, and I thought a great deal of Mrs. La Fetra at that time. She had taken me in and employed me. After the death of Mrs. Magaw I did not state to any person that I was going to have that codicil broken or that I would try to have it broken. I did not so state to Mary Wright. I never mentioned that I would break the codicil at all. I never made any threat that I would try to have it broken. I correspond with some of the Magaws, Clara Magaw, Mr. Van Brunt Magaw's daughter, the executor of the Will. I have been corresponding with the Magaws quite a while. I visited them last summer and stayed almost three weeks. They entertained me as their guest, showed me the beauties of the country in their automobile, and so forth. I had a very fine time. We talked about various things and about Mr. Magaw's visit to Washington. I mentioned a few things about the Will at the house while at the table; talked with Van Brunt about it, not necessarily alone, but at the table. At the table it was a matter of ordinary conversation, I did not talk to Robert about it, I never had any occasion to do so, I did not as a matter of fact
57 at any time about this Will or codicil. I did not know anything about the execution of the deed until I saw it in the paper on the 30th day of May. Mrs. Magaw did not tell me she was going to make the deed and I did not know about it. I was not present when the codicil to the will was made, but when it was signed, Mrs. Magaw directed me where the will was. She looked for it in the drawer and tried to find it herself, and not succeeding

told me to get it. She did not tell me she was going to add a codicil; she didn't tell me what she was going to do with it, just that she wanted it. The Will was under a paper in the drawer in her desk. She did not tell me she wanted to make a codicil to it, she didn't say why she wanted the will. Miss Hettie Fague was not there at this time, I was in her place. I testified that she did speak to me several times before she made this codicil about doing something for Hettie, but she did not say anything at the time she told me to get her Will, and I did not know for what purpose she wanted it. I can't recall when was the first time she spoke to me about doing something for Miss Fague, it was when I first nursed her, she repeated that a number of times, on several occasions she said so. Nobody was in the room except myself and Mrs. Magaw when she told me to get her Will. I don't recall the date at all. It was several days. I got the Will out of the desk and gave it to her and I never saw it again until I executed the codicil. When I gave it to her she put it in the desk, she didn't sign the codicil at her desk, she signed it at a little table. At the time it was signed, I don't know whether Judge Doane asked her whether or not that
was a codicil to her Will, I didn't pay any attention to it, I
58 do not recall it. Mrs. Sarah D. La Fetra hired me in place
of Miss Hettie and I as paid by Mrs. Sarah D. La Fetra by the week for the time I worked nursing for Mrs. Magaw. I went to her on Tuesday and I was paid for the balance of the week, and I was paid every week, I was paid by money, by Mrs. La Fetra. I signed my name to the codicil and then went out of the room, I think Mr. Forrest took the codicil, I am not sure, I don't know of my own knowledge. I saw the codicil after her death. I did not see it over in the court, I saw the paper over there, yes, sir, downstairs over in the court house, at the time I made an affidavit about the Will. I regret very much that I did do it. It was on the spur of the moment that I did it.

Q. What do you mean by that? Do you mean to say that what you stated in the affidavit was untrue? A. I signed it, and I understood it meant in regard to her sanity. She was sane at that time and in her right mind.

Q. She was quite sane and capable, as you stated, in your affidavit, of making a valid deed or contract at that time? A. As I supposed, yes, sir. She had some trouble in using words, she would know what she wanted to say, but had difficulty in expressing what she desired, she was a woman of strong conviction, strong will, if she wanted to do a thing she wanted to do it, that was her characteristic with me only. Her difficulty seemed to be in respect to expressing her thought, what she desired to say. When I nursed her I used to read newspapers to her, she wanted me to do it. I do not know whether she understood what was in the newspapers or what
59 I read to her. Some things I think she wanted me to read
to her and some she did not. I read the Brooklyn, N. Y. News to her, and various news. I did not do that at her request. I picked out the news to suit myself, what I thought would interest her. It was usually in the evening. I read the Bible to her once,

she did not designate what she wanted read, I made the selections myself. This was done every morning and evening. She was a very good woman. Miss Hettie Fague came back the first day of March and remained with her until her death. I went away on my vacation on the 7th day of August, 1907. Mrs. Magaw was still living when I went away. After Hettie Fague came back, I went to her room and saw Mrs. Magaw nearly every day. I did not read to her after Miss Fague took her place. I think Miss Fague was away from the 29th of January to the first of March 1907. Mrs. Magaw seemed to be grateful to Miss Fague for what she had done for her. The last time I saw Mrs. Magaw was the day before I went away; in fact the morning I left I went up and said good-bye. I told her I was going away. When I would go to see her I talked about various things. Nothing specially.

By Mr. LEIGHTON: I have not had time to examine the exhibits offered in evidence by Complainant's Counsel, and for that reason I may desire to recall this witness for further cross-examination, but for the present I have finished with her.

Redirect examination.

By Mr. McDIVITT:

I said that Mrs. Magaw was grateful to Mrs. La Fetra.
60 She seemed to be very fond of Mrs. La Fetra, she liked to have her up there. Just simply—that is the only way I can express it, she smiled when Mrs. La Fetra came into the room, and said "Sit down." Of course she smiled when anybody else came in, with all whom she liked, Mrs. La Fetra too. That is the only way I can express it.

Q. What did she do to show that she liked Mrs. La Fetra that was different from what she did to show her likeness for other people? A. Well, I know that if Mrs. La Fetra wanted her to do anything she usually did things for her.

Q. What did Mrs. Magaw say or do to make you think she liked Mrs. La Fetra. A. That is all I can answer to that. I have given the best answer I can to show what I mean by saying that she was grateful to Mrs. La Fetra. On cross-examination I said she was strong-willed. Her strong will was manifested in this way, if I wanted her to go down to dinner and she did not want to go, she would not go. If I wanted her to put on a waist and she did not want to do it, she would not do it. That is all I know. I never talked about her business affairs to her. She never talked to me about them. There were no other acts of Mrs. Magaw upon which I based my statement that she was strong-willed.

Q. How do you know that Mrs. Magaw wanted you to get the Will? A. She said the paper.

Q. Had she examined the paper in your presence before
61 she said get the Will? A. What paper?

Q. The paper on cross-examination you stated she said get the will? A. She said the paper, and I thought she wanted me to get the Will. I can't recall what it was that she said which made me think that she wanted the Will. I did not find the paper myself,

I went and asked Miss Fague at the hospital where it was and she told me; I came back and found it where she told me it was. I just can't recall how far back, my correspondence with Clara Magaw began. The first letter I think I got was when I spoke about going on my vacation, and Clara invited me to come and see them. That was before Mrs. Magaw's death, when I went away the first of August.

Recross-examination.

By Mr. LEIGHTON:

Q. You went to inquire of Miss Fague for the will at the request of Mrs. Magaw? A. Hettie knew where it was.

Q. She told you to go and see her and find out where it was? A. Yes sir. Mrs. Magaw had lived with Mrs. La Fetra for a long time, I don't know just exactly how long, she was there when I first knew her. Mrs. La Fetra was very kind to Mrs. Magaw.

Q. Mrs. Magaw appreciated the kindness and spoke to you about it at different times while you were there?

By Mr. MCDIVITT: I object on the ground that the witness
62 cannot state except from her actions.

A. So far as I know she did. I do not know whether she did or not. I say she smiled. She had no way of expressing it. She would smile when she came in.

Thereupon FRANK M. SMITH, a witness of lawful age, called for and on behalf of the complainant was duly sworn and testified as follows:

By Mr. MCDIVITT:

I reside at 49 Seventh Avenue, Brooklyn, N. Y. I knew Mrs. Alice D. Magaw in her lifetime for possibly 20 years, as the husband of her grandchild for 10 years, possibly 8 to 10 years further. I used to see her every summer when I was on and visited the house as a member of the family, that is since I was married and prior; she occasionally visited my house, it was very rarely. I visited her in Washington as frequently as I came through here when traveling. I saw her last on Palm Sunday, of this year, the 24th of March. I looked the matter up in my diary, where I kept it very closely. I was returning from Cuba and Florida on a trip with my wife, and instead of going straight home in the Southern Limited train, we stopped off here to see grandmother on a Sunday morning between 11 and 12, and spent an hour with her. When we went to the hotel, it is my recollection that we announced ourselves to the clerk; a stout gentleman at the desk, who, I am of the opinion, ran the elevator, and who showed his pleasure in meeting any of Mrs. Magaw's family, and took us up to the room and announced us. The
63 gentleman or boy who went up with us rapped on the door and announced us, he said, this is your grandchild and Mr. Smith. I think the clerk said this. Grandmother and her nurse were in the room. It was Miss Fague; she was so introduced by her-

self. We both approached, my wife first, eagerly, to see Mrs. Magaw. She did not rise from her chair, smiled, we told her who we were, asked her if she did not know us. She showed pleasure in what I called a childish laugh. She did not call us by name, though her nurse prompted her with information as to who we were after we had introduced ourselves to her, she knowing very much of my wife through other members of her family, but grandmother did not, as customarily, get up and approach us eagerly and embrace us, as she has myself before, when I have been there. We talked to her and stayed there about an hour. We described our trip, asked her many questions about herself, knowing of her long sickness, but so far as I can remember all the information we got regarding grandmother came from her nurse, who was an eager talker, and especially pleasant to us, and I can't remember that grandmother mentioned the name of our family, which was in very strong contrast to my own visit alone in 1905. I was with her Sunday April 2, 1905, in her room in Washington at noon time Sunday April 2, 1905, and the contrast in her condition between those two dates was very sad and very distinct. I have never been able to satisfy myself that grandmother knew me when I came or when I left. I refer to this second visit on Palm Sunday of this year, 1907. She would, with impatience say, "Why can't I say it. I can't say it." And she
64 would not show real intelligence or appreciation of what we were telling her. I thought that she was childish, and if there were passing thoughts or expressions she wanted to say, she, at least, did not express them. She pointed on the wall and said "See", to a wreath, a Christmas wreath, and her nurse told how her son Van Brunt Magaw had brought it at Christmas, and how grandmother would not let it be taken away. It was withered badly. I thought it might be an artificial wreath, and I got up to examine it. She called that wreath "service." I took that to mean that she tried to tell me who brought it. The word service impressed me as what I would term silly, as all the unusual amount of levity that Grandmother displayed, compared with my experience with her on the many times that I had seen her prior to this.

Q. In your opinion, did Mrs. Magaw at this time have mental capacity to attend to or manage any business matter?

Mr. LEIGHTON: I object to that question. No sufficient foundation of fact has been laid for an expression of opinion as to the mental condition of decedent at the time of which he speaks.

A. The fact that she did not know her own grandchild, in my opinion, that fact that she did not know who I was, nor did definite explanation show that she knew who I was, she certainly had no capacity for attending to any affairs.

Cross-examination.

By Mr. LEIGHTON:

I am a merchant in New York City, importing merchant. I married Sadie daughter of Van Brunt Magaw, a grandchild, just

65 10 years ago, 1897. Mrs. Magaw visited me after my marriage at my house, I think two or three times. The last time was probably five years ago, in that neighborhood.

Q. When you saw her in 1905, was she in her usual mental and physical condition? A. She was aging on April 2, 1905, but bright and cheerful, more than glad to see me. I have taken from my pocket a paper and referred to it as part of my evidence, an extract from my diary. I do not keep a diary on all matters. I keep a diary of my daily travel or movement to designate where I am every day in the year, a business man's necessity, that was the only reason why I made a minute of this visit to Washington at this time, because it was my custom to keep a record of just such events. I was on a pleasure trip at the time, on pleasure entirely, I did not see her on business, it was my custom if I visited a person on pleasure to keep a note of it, invariably if out of town, I did that simply to denote where I was on that day. I have made a note that I called on Grandmother, Palm Sunday, in my diary, and I have a note that I was in Washington, arrived in Washington that Sunday morning with my wife for the purpose of visiting grandmother. I have that in my diary. I have it with me, that is, I have for that one day. The other I have not. It is a yearly book. That is March 24th, is it not, sir? That is what I mean. You will find 24th March Washington and home. The dates prior show where I was every day prior, some of it appropriate to my satisfaction, and easily explained. (Witness produces diary and exhibits the same to counsel for de-

66 fendants.) I say on this last trip I was with Mrs. Magaw, probably about an hour, possibly a little longer in the room. I remember no one else there except Hettie Fague and Mrs. Magaw and except my wife and myself during that hour. I and my wife gave an account of our trip, attempted to describe our trip. I have not been convinced myself that Mrs. Magaw showed any appreciation of it, or that we might have talked about anything else in the world. She had no trouble with her hearing and she evidently heard what we said.

Q. You do not know whether she understood what you said? A. Very little. She gave us no real assurance that she understood what we attempted to describe to her.

Q. You said she manifested a sort of impatience at not being able to express what was in her mind? A. That is what I would infer partially.

Q. She wanted to say something and could not get the right word to express what she wished? A. It seemed so.

Q. That seemed to disgust her? A. Yes sir, but there was very little of it.

Q. When she did speak and made and error in the selection of a word, she knew she was not expressing the thought she had in her mind, and was conscious of the fact that she had not expressed what she desired. Isn't that so? A. I could not say what she desire- to express, but her expressions were very incoherent and muddled. She used the wrong word. She did that several times, but what strongly impressed me was the incident of the wreath.

Q. She put her words in the wrong place, and did not express what she meant?

67 By Mr. JACKSON: I submit that as to what was in the mind of the decedent is improper cross-examination.

A. I have no idea what she meant.

By Mr. LEIGHTON:

From the conversation I had with her, I couldn't tell what she thought or desired to express. I knew she had some property here by hearsay. I knew very little about her financial condition. I did not myself have anything to do with her business affairs. That is the last time I saw her until she was brought home. I did attend her funeral at Long Island. She was being nursed at this time by Miss Hettie Fague, that is the name as I understand the lady's name. I would not recognize her to-day. My whole attention was given to Grandmother, and if Miss Fague were in the same room and in the same garments, perhaps I would know her. She isn't here now, is she? I say that Hettie Fague received us more than pleasantly. I mean by that, very graciously. We liked her manner. By repute she took very good care of Mrs. Magaw. I have no knowledge of anything to the contrary. I haven't any idea how Mrs. Magaw regarded her, since I have not seen Grandmother in the interim while Miss Hettie was with her. I don't know whether Mrs. Magaw felt grateful to her. She was an employee getting well paid, perhaps. There is no reason why she should not have been. I have no idea whether she was being paid by Mrs. Magaw herself. Certainly from Mrs. Magaw's estate.

Whereupon SADIE L. SMITH, a witness of lawful age, called
68 for and on behalf of the complainant, was duly sworn, and testifies as follows:

Direct examination.

By Mr. MCDIVITT:

I reside at 49 Seventh Avenue, Brooklyn, N. Y. I knew the deceased, Mrs. Alice D. Magaw in her lifetime. I was her Grandchild. I am the daughter of Mrs. Magaw's son, Van Brunt Magaw, one of the defendants in this action. I saw the deceased last before her death on Palm Sunday, 1907, at Washington, La Fetra's Hotel. My husband, Frank M. Smith, who has testified in this suit was with me. I will tell the conversation that took place at the time of my visit to Mrs. Magaw to which I refer. I can't tell it in very few words, we asked Grandma questions but she couldn't answer us anything, and she would begin with one word or two words and Miss Fague would finish it, help it out or help her out,—nothing connected at all. When we first entered the room, we greeted Grandma, kissed her and walked up to her and greeted her. She didn't say anything, said nothing. She,—well, I don't know whether she stood up. Yes, we explained who we were. She smiled, didn't say anything. We

greeted her, kissed her and she returned it, of course. We couldn't hold any conversation with her whatever. We tried to tell about the things home, but whether she understood it, I don't know, she didn't seem to. We asked her how she felt talked about things at home generally,—I can't recall just what she said, general conversation. We were on our way home at this time, and reference
69 was made to where we had been. We told her all about our trip. She didn't make any answer whatever, she didn't try to talk while we were there, if she did, it was only one or two words, I couldn't make out anything at all she meant to say. She would say "promise" or "service" in disconnected words. We were there about an hour. Miss Fague was there. There was conversation among us during that hour. We talked and Grandma listened because she couldn't enter the conversation at all, that is, we all talked and in a general way.

Q. What did she do or say indicating that she knew who you were? A. I am not sure that she did know who I was.

Q. What did she do or say? A. Not a thing, that is, she didn't,—she said she knew us, but didn't act as though she did. I had not visited her before in Washington; on account of young children, I never have been able to visit her before. She had visited my house, she was well acquainted with me. There was not any reason for estrangement between her and me as far as I know. Miss Fague said something about the condition of Mrs. Magaw but I don't recall the substance of her remarks. She looked well in the face. By her actions and everything that I saw she looked natural as I knew her, she did not act naturally as I had known her, the difference was that she couldn't speak to us, she couldn't ask me a question, she tried to she made a special effort to, she would get as far as one or two words, then stop.

Cross-examination.

By Mr. LEIGHTON:

The last time that I saw her before this Palm Sunday was
70 when she visited my home, that was two years ago, I think. Two years before that, she was then in fair condition of health for a person of her age. No difficulty with her mind at that time. She was a woman of strong intellectual force. A woman of a good deal of will power, she was positive in her opinions in some things. At this time that I speak of, she visited most of the summer at my father's home. I would visit whenever I was able to go there. I wasn't living with my father. She was at my father's house and what I saw of her was when I called in, whenever I was able to visit her, and she also called at my home two or three times. There were no relations of any special intimacy between myself and my grandmother, any more than as a grandchild. I say I don't know whether my grandmother knew what was said when I visited her on Palm Sunday, I don't recall what I said to her, just a general conversation.

Q. She made efforts to speak but couldn't get the word that seemed to express what she desired? A. No. I can't say that from her

manner, I thought she knew what I said, what the subject of my conversation was. Miss Fague sometimes seemed to know what she desired to say. Miss Fague very often supplied her with a word when she desired to speak, helped out. Very often suggested a word. It is impossible for me to know whether Mrs. Magaw recognized what Miss Fague suggested as being the proper word expressing what she desired to say. From her appearance she did not impress me as acquiescing altogether in what Miss Fague suggested, sort of a vacant look. I saw her on this Palm Sunday but
71 once and that about an hour in time. We left the Florida Limited Train on purpose to see Grandma, we were en route to New York and left the train on purpose to see her and spend what little time we could with her. We didn't stop over night, and we only remained in the City a short time. That is the last time I saw her alive. No one came into the room while I was there except Miss Fague. No one was present while I was making this visit, outside of Miss Fague and my husband and I no one else came in. When we were there it was about 11 o'clock. We didn't remain to lunch. I do not recall any subjects of conversation between myself and my grandmother, just a general family conversation that I don't recall word for word.

Redirect examination by Mr. McDivitt:

Q. During your interview with Mrs. Magaw, did she utter an intelligible sentence? A. No.

Question objected to as leading and not proper redirect.

Van Brunt Magaw, a witness of lawful age, called for and on behalf of the complainant, was duly sworn, and testifies as follows:

Direct examination by Mr. McDivitt:

I reside at 1486 Ocean Avenue, Brooklyn, N. Y. I am retired from business. I am the oldest son of Alice D. Magaw, deceased. My father's name was Robert. He is dead, he died June, 1887, in Brooklyn, what was then the Town of Flatlands. My mother, Alice D. Magaw, resided up to the time of the death of my father at the Town of Flatlands, now Brooklyn on the farm. My
72 father was a farmer. My father and mother were living together at the time of his death. They were members of the Dutch Reformed Church there in Flatlands. They had been members of that Church a good many years, I couldn't tell you just when they joined, a great many years ago, as long as I can remember. My father had been an officer of the Church a number of times, mother,—yes, I should say, they were active members. Rev. John S. Gardner was the Pastor of the Church at the time of my father's death. After the death of my father, my mother went to Washington to live. She went pretty nearly upon his death, I don't know as I could tell you exactly to the month; she stayed in the old house there a while, she was at our house and my brother John's house. John is her second son. At the time of my father's death, he left him surviving only three sons, myself, John D. Magaw and Freder-

ick L. Magaw. John is dead. He died seven or eight years ago before my mother's death. He left only two children surviving, Robert Magaw and Stephen R. Magaw; those two children of my brother John D. Magaw are now alive and are defendants in this suit. After the death of my father, my mother for a time lived at the old house and then with my brother John and then with me a few months. Then she went to Washington to live with Mrs. McCullough, who brought her up. Mrs. McCullough was the lady who brought her up, her mother died very young, she lived then with this lady in Circleville, Ohio, until she came to New York, that is near Columbus, about eighteen miles from Columbus, south. She lived with Mrs. McCullough until the latter died, and then she lived with Mrs. McCullough's daughter, Mrs. Williams, until the latter gave up
73 housekeeping (her husband died) and then Mrs. Williams went to live with her son, I believe, and then mother had to go somewhere else. She went to La Fetra's Hotel. During Mrs. Magaw's residence in Washington she visited my home, always came there every summer. She stayed almost all summer, she would come early, about this time of the year and even earlier than this and stay until cool weather, fall. During the cooler months of the year when she was in Washington she corresponded with me or my family pretty regularly. She was more regular than I was, I am sorry to say. She did not do so up to the time of her death; she did so up to the time she was stricken with this hem*m*orrhage,—this hem*m*orrhage of the brain,—whatever you call, rupture. Miss Fague used to write for her then, well that was,—it was in 1905, August 14, 1905, I think, when she received this stroke, whatever you call it. My family visited Mrs. Magaw in Washington. My daughters were there very often, two weeks at a time.

Q. What do you say with relation to the friendly or unfriendly feeling that may have existed between your family and Mrs. Magaw during her stay in Washington? A. Who said there was ever any unfriendly feeling,—I didn't know there was any.

Q. I ask you whether there was or not? A. Oh, no, not at all, I never heard of that before,—any question raised about it? I became acquainted with Mrs. La Fetra by my visits to Washington. I remember a time when Mrs. Magaw was taken ill and I was sent for. I got a telegram from Mrs. La Fetra; she went there, she left our place on the 14th of August, I think, *on* the 1st of Sep-
74 tember or the latter part of August, I don't remember which. I got a telegram to come on, she was seriously ill. I mean my mother left my house in August. Well, that's all there is about it. I went there right away, I got a telegram about 11 o'clock and I took the afternoon train and I went there and I couldn't get a train. I don't know what delayed it, I didn't see my mother that night but I saw her next morning. I also saw the Madam, Mrs. La Fetra, and there was an attendant there in the room, a colored woman, I think at that time. I guess that's all I saw in the room with her. I went in to see her and I saw right away,—at least I made up my mind she was a mental wreck and I tried to talk with her and I usually kissed her when I went down there, she didn't get off the chair, I kissed her but she didn't respond, I had to take her hand

out of her lap and shake it, she tried to talk but not intelligently, I don't remember what words she used at that time because most every time I went down there she had a different word, sometimes it was "blossom," sometimes it was "spirit," she would keep repeating a word,—I never heard her speak an intelligible sentence after that. I don't think I could give you the exact conversation because I was down there a number of times, quite a number of times and her conversation was meaningless, and I didn't try to hold any conversation, it distressed me to hear her, she tried to talk and she couldn't. Mrs. La Fetra joined in the conversation. I couldn't tell you what she said. I don't know what she sent for me for, unless it was to come and take mother away, that was what I thought it was in the first place.

75 Q. What did she say when you came down there didn't she say something to you, didn't she tell you why she sent for you, or what was the conversation? A. I knew why she sent for me when I saw mother.

Why certainly there was something said but I couldn't repeat the conversation, I asked her how she felt, I asked mother how she felt, she would repeat whatever word she was using at that time, I don't remember now what it was. Mrs. La Fetra did most of the talking but I can't tell you what she talked about. I can't remember a thing she said. I think I left Washington the next afternoon, I came home and told my wife how she was and we went right back in maybe a couple of days or next day, afterwards. I saw Mrs. La Fetra at the table in the morning, she came to our table and she asked me what I proposed to do, I told her I supposed she didn't consider mother a desirable patron there any more and I didn't know what we should do; then she asked me if I would become responsible for her expenses there and I told her I wouldn't; then she said she can't stay there; I said, "That's exactly what I want you to tell her, then I can get her home, probably," I wanted to bring her home. She left the table then and I never heard any more about our taking her home. She wanted me to see if I couldn't become Trustee and the first man I went to see was our friend here, (referring to Mr. Leighton) his office was locked and I didn't see him. Mrs. La Fetra referred me to Mr. Leighton. I didn't know anybody in Washington then. Well, I came away that day without doing anything about that; the next time I went down was

76 with Robert Magaw, the complainant in the suit, and we went to see a Mr.,—oh, before we went there I saw the Doctor, Doctor Custis, and Mrs. La Fetra had asked me to become Trustee for her, manage her property there, and I asked the Doctor if he would testify that mother was incompetent. He said, "No," he expected to bring her out, expected that she would recover, so I went to see Mr. Larner, John B. Larner. The result was I came away from there without making any effort to become appointed a Trustee. I talked with Dr. Custis' son, the Doctor; that's the time I was down there with Rob,—this trip that I went to see Mr. Larner,—I followed him out when he left. I asked Dr. Custis, Jr. what he thought of mother's case, he said she would never be any better. I don't remember whether he said what the condition was, or not; he said

she would have another attack and it would kill her, take her off; said she wouldn't last long. Dr. Custis, Sr. said it was caused by the bursting of a blood vessel in the brain. My next visit I think was earlier than Dec. 1905, I am not sure about that, but it wasn't a very great while after. Robert went twice, he went down in December, that was another time. I know it was quite warm weather because Dr. Custis came there without an overcoat, buck-wagon and his back curtain up, and I was waiting for him on the sidewalk, I wanted to leave for home and see him before I left. When I went with Robert Magaw, it was a few months after the two visits that I have described. What I did or saw, then was about the same thing. I went down with Robert to see if I could become a Trustee to take care of mother's property, because the time before when I was there, when my wife went down we tried to get her
77 to sign some checks, that is, for a bill that was due, Dr. Custis, and Mrs. La Fetra's and we had a great deal of difficulty, she couldn't sign a check; but we afterwards did get her to sign a check; I think it was Ed. La Fetra because I know the next morning he wanted me to go to the bank; they refused to pay him on that check, on her signature, and I went to the bank and told them it was all right and they paid it, I had no authority, I wasn't Trustee, I don't know why they paid it, but they did, he got the money anyhow. I think that was the second interview, the second trip I made down there, when my wife was with me, but I am not positive about that.—I went very often at that time. I can give you the dates to the day if you let me refer to my memorandum, I keep a memorandum, a daily memorandum and I can give you the exact date. I have the date here in my pocket. Within a week after my first visit I went down with my wife, I thought we would bring her home, that's what I wanted to do, and when Mrs. La Fetra said if I wouldn't become responsible for her expenses there, she couldn't stay there, I thought we would get her home. I went down there with Robert Magaw the first time a few weeks after I had been first sent for by Mrs. La Fetra. That was not the time when I went to Mr. Leighton'- office at Mrs. La Fetra's suggestion and then saw Mr. Larner. I think I went to see Mr. Leighton when I was with my wife, the next time when I went down with Rob then we went to this other Mr. Larner. As to the next visit, I know we went down just before Christmas. Robert and I in 1905, I think it was; we didn't do anything much there, we didn't accomplish much,—oh, I think at that time I went to see a Mr. C. M. Forrest,
78 no, I don't think I went to see Mr. Forrest then,—no, we didn't know him at that time. I think I went down there eight or nine times, nine or ten times, maybe, to see my mother between the first time Mrs. La Fetra sent for me, and mother's death. At none of these visits, did my mother call me by name unless someone in the room mentioned my name first. She would say, "Van" when Miss Fague would always say, "Here is Van, you know Van." At these interviews with my mother, she tried to talk. As I said before, she would keep repeating a word, "Blossom" or "service" or "promise" and there wasn't any sense to what she said; you couldn't make anything out. The people in the room, Mrs. La

Fetra or Hettie Fague would say she means so-and-so,—they guessed at it; I suppose,—I don't know how they knew what she meant. I never quite satisfied myself that she knew at any time, who I was, but I won't say that she didn't know either. I don't know whether she did or not, she had a kind of a vacant look, she didn't look natural.

Q. During any of your visits there did Mrs. Magaw utter an intelligible sentence without assistance from someone else?

Mr. LEIGHTON: I object to that as leading, suggesting the answer.

A. Oh, no, I never heard her utter,—I said that before. I hadn't heard her utter an intelligible sentence since she left our house on the 14th of August, 1905. When she talked or tried to talk with me she made motions, she would keep gesticulating with her hands. The Doctor was there, came there every time I was there. From her words and actions and appearance, she appeared to be
79 very ill, I should think. I remember a visit there when Robert was with me in December, 1906, just before Christmas, we trimmed her room with Christmas greens. You could see she noticed that, because I hung a large wreath up in the window, and got a plant, I believe, a what do you call it, not a hydrangia, I say I hung a large wreath up in her window and I got some cut flowers and a plant, I believe,—what do you call that, something about Christmas, I can't remember the name of the flower. She seemed to like it, she was always very fond of flowers. I couldn't tell you the words she used. I called her attention to it, I couldn't tell you what I said in words. I don't know that she said anything intelligible. She made an effort to say something, I couldn't tell you the way she put the words together, but she continually used the word, "promise," she was unintelligible and I didn't encourage her to speak because it distressed me to hear her trying to talk when she couldn't express herself. I think that was the time I bought a couple of radiometers, I think they call them, they go around,—well, I meant to take home to the children but I sat one of them up on the mantel that was near a light made them go round and they were driven by the power of light and it seemed to amuse her very much and I left it there. I couldn't repeat any of her sentences, I don't think. She did not sit perfectly still. She looked at it, she was talking about it all the time, in this unintelligible way; I didn't understand what she said, of course I couldn't remember,—if I understood what she said I would remember, if I had understood what she said probably I would have remembered. I remember
80 when I went there she would always want me to go out and see the place and she would say "You go up there" (Witness points with hand), I would say "Where", I would say, "you want me to go to the library", she would say, "yes". She showed irritableness because of her inability to talk. I remember one evening I was there and I told Miss Fague she could go out, Miss Fague wanted to go out, she was tied down there,—I said "I expect to be here this evening, you can go out and take a few hours off", she became very irritable, she tried to talk she couldn't make me un-

derstand what she was trying to say and she became very irritable, I was very glad when Miss Fague came back. She was totally blind in one eye and I think she was nearly so in the other. I don't know that Miss Fague ever made any remark to me about reading to Mrs. Magaw, but I know she used to read to her, I have come in there when she was reading to her. I don't think I could tell you when I saw my mother again after the visit of Dec. 1906, unless I can refer to memorandum. I must have seen her five or six times. I thought I noticed a failing all the time, she was not any better able to talk or express herself. I thought she failed all the time. No, I wasn't in Washington when she died, I left the night before she died and came back the next day. My daughter was there with her and helping her. I saw my mother last before her death the day before she died. She was very weak and in bed, she sat up, she had heart trouble, I believe, I don't know but what the Doctor told me she had dropsy and she couldn't lie down very well. The day before she died I saw she couldn't last very long and I came
81 home and told my wife to get ready and go right down and I followed, I guess the same day. She was in her room at that time. Mrs. La Fetra was at the hotel then. I don't remember whether I had any conversation with her, this was not the time when Robert Magaw was with me. Oh, after her funeral, after we brought her home, and when he went down with me that was after the funeral. I brought her home with me at this time, it was Saturday, and Sunday morning there was a little service in the hotel and the undertaker put her on the train and my wife and I came home with her. I telegraphed on for an undertaker at Brooklyn to meet her and we brought her to the house and we had the funeral Tue-day, and we buried her in Greenwood, in the Magaw family plot where her husband is buried, right alongside. I think the next day Robert and I went to Washington. We saw Mrs. La Fetra and we went down and saw Mr. Forrest, he read the will to us the codicil and then we came back and saw Mrs. La Fetra. I went to Mrs. Magaw's room, I didn't see none of her effects there, cleaned out, yes, ready for use again. Well, Mrs. La Fetra told us she had sent Mrs. Magaw's effects to different places, I don't remember where now, I believe to,—she told us she had sent them off somewhere, disposed of them, I didn't see anything of her furniture or stuff there. Her clothing was put in a trunk the night of mother's death and we brought that on with us, that was all taken home when we came Sunday. The furniture, I think, belonged to her, all the furniture, I think. The only way I know is, her Will provided what should be done with
82 that furniture, and I suppose it must have belonged to her or she wouldn't have disposed of it by Will. That is all I know about it. Mrs. La Fetra said, she had given them away to the Deaconesses' Home, I think, she gave a lot of this stuff, we had quite a conversation with her, with Mrs. La Fetra.

Q. I will ask you what, in your opinion, was her mental capacity for attending to business of any kind when you saw her in December, 1906? A. Oh, she wasn't capable, of course I don't think so.

Question objected to, witness has not shown himself to be so conversant with her condition as entitles him to give an opinion as to her mental condition at the date of the execution of the deed in question.

Q. Was there any difference as to her mental condition so far as you observed between December 1906, and the time of her death? A. Yes sir, there was a difference for the worse. I have a way of refreshing my memory as to the time of my visits to my mother between December, 1906 and June, 1907, if I can refer to my daily memorandum, I can tell you the day and the hour I saw her every time I saw her.

Q. I show you a memorandum, is that in your handwriting (handing witness paper)? A. Yes, I think so, yes, I think I copied this from my daily memorandum.

Mr. LEIGHTON: I object, we are entitled to the original, if any, it is not competent for the witness to refresh his memory with a copy of something that he has written.

83 Q. Can you remember whether you visited your mother at any time between your visit of December, 1906 and June, 1907? A. Oh, I know I must have.

Q. You can't remember any particular time? A. No, it has made my memory very poor, I know that. I am familiar with my mother's handwriting. I have often seen her write. (Witness shown a letter and asked whether this letter is in his mother's handwriting). Witness replies: Yes, sir, I haven't read it over, but I know very well.

The paper referred to is marked for identification "For ident. Complainant's Ex. No. 1" of May 22, 1908.

Q. I show you another letter and ask you whether or not this letter is in your mother's handwriting (handing witness paper)? A. Yes, sure.

The paper referred to is marked for identification "For Ident. Complainant's Ex. No. 2" of May 22, 1908.

Mother always tried to talk, in fact, I used to try to discourage her because it was distressing, I don't think I could,—I couldn't give her conversation word for word because it was meaningless.

Cross-examination by Mr. LEIGHTON:

The date of my mother's death was the 10th of August 1907. I think she went to live with Mrs. La Fetra in 1902, about five years prior to her death.

Q. What property did she leave in Washington? A. She had three house on B Street, I think.

Q. What is the value of these houses? A. Mr. Forrest
84 said they were worth about $11,000 or $3,600 for each house.

Q. Any other property? A. Not that I know of. This property was property that she got through her husband. It represented her dower interest in his property. It was her provision under

the Will of my father. So far as I know she exercised her own judgment as to what she should do with her money after the estate was settled; she may have employed a broker for all I know. I had nothing to do with it. I don't think any member of the family had any thing to do with it after she moved to Washington. When she went there first I tried to discourage her from taking that money and investing it in Washington, she told me what she was going to do with it, get 9% out of it by investing in real estate, I told her she wouldn't get nine per cent. and anybody who represented that she would, was misrepresenting and she would get in trouble, and she did get in trouble because I had to go there, I had to raise some cash. She was a woman with strong will, she didn't take my advice at that time. She took my advice in the latter end, though I advised her the last instalment of money I sent her, advised her what to do with it and she did it to the letter. She invested the last instalment in mortgages in Washington. That is what I refer to when I say she took my advice. I advised her to put it in mortgages and she did it. She had $2500, $1200 and $1500 invested in that way. I think there was three of them that I came across. That is what

85 her property consisted of at the time of her death. So far as I know she did not have any other property except these three houses and those mortgages.

Q. You didn't know, as a matter of fact, whether any of these articles of personal property that were in your mother's room were hers or whether they were somebody else's do you? A. Except I know it from her Will I don't know it.

I think I heard her say that she bought this and she bought that, when I would go down there. The furniture consisted of bedroom furniture, she had two rooms there, a bedroom and a sort of reception room, I suppose, couch and bed and bureau and desk, it didn't amount to much, I didn't suppose, I didn't think it was worth while to chase after it, when Mrs. La Fetra told me she had disposed of it I thought it would cost more to go and find out than they would be worth. They would be second-hand stuff anyhow. The date of my mother's will, I think was 1895. She was all right at the time she made that; she was all right at the time she left our house, the last time, the 14th of August, 1905; feeble of course, she was old, she was in her eighty-second year, I guess at that time, but her mind appeared to be all right, and I think she was all right at the time she made her Will. It was about ten years after the date of the Will (not the Codicil) that I received this telegram from Mrs. La Fetra about mother's condition.

I offered several times to provide a home for my mother before her death. I offered to give her any room in the house, we have letters, I think where we wrote to her, offered to give her any room

any bedroom.

86 Q. She declined to live with her family after her husband's death, making it her home there, she preferred to live elsewhere? A. Yes, she lived for a great while with Mrs. McCullough. She said the climate agreed with her better in Washington. I renewed my offer, after the death of Mrs. McCullough's daughter,

for her to come home, continually, always told her when she left whenever she felt like it to come, but she preferred to reside in Washington. I heard indirectly when she first started to board with Mrs. La Fetra,—Mrs. Williams told me about that first, she didn't like it, she didn't think it was a good place for her to go. Well, I don't know what,—she never liked Mrs. La Fetra, I know that. Mrs. Magaw seemed to like Mrs. La Fetra. So far as I know she was treated kindly by Mrs. La Fetra while she was there.

Q. It was her own volition going to Mrs. La Fetra's, she went there of her own will? A. Why, nobody could stop her,—yes, certainly she did. When I received this telegram I went on alone the first time, I started right off, I got ready right away, it was just before our dinner hour, I suppose about eleven o'clock, and I got an afternoon train, I got there so late I didn't see her that evening, I went alone, and the next time my wife went with me, that was a few days afterwards. I did not go back with Robert, the plaintiff in this case, after this first visit. He went with me the third visit, the second visit my wife went with me. It was the third visit I consulted with Mr. Larner, Robert was with me. I tried to consult with somebody the first visit. It was not Robert's suggestion that I consult
87 a lawyer. I think it was Mrs. La Fetra's, she wanted me to become Trustee or,—well,—it was at Mrs. La Fetra's suggestion. The old Dr. Custis was in attendance on my mother at this time, George Custis, a very old man. I think he had been her physician for a number of years. I don't think I ever met him until that time, though I came on. He continued her physician up to the time of her death, but his son, J. B. Gregg Custis, called on her at the time I was down there with Rob, the third visit, I suppose as a substitute for his father. His father wasn't there. I suppose he was there as a substitute for his father, it was warm weather and I supposed the father was off on a vacation,—I didn't ask why he wasn't there. I don't know whether the young man only attended my mother this once. I don't know if Dr. George Custis declined to testify that my mother was not capable of taking care of herself or her property, but he said he expected to bring her out all right, he didn't say at the time she was incompetent but he said he expected to cure her, and he wouldn't testify. I have not communicated with him since to know whether he changed his mind about that. I didn't write to him after this suit was commenced to see what his view was in respect to her mental condition at the time she made this deed and codicil. I do not know whether the attorney in this case did or not. I never had an conversation with him other than I have mentioned with respect to her mental condition at any subsequent time. I spoke of relieving Hettie Fague on one of my visits, sending her out, and I say that my mother tried to talk with me and be-
88 came irritable. I can't say that she seemed to know what she desired to say or could not select or choose the word she wanted to speak, I don't know that. I don't know whether that is, or is not the fact about it. I don't know what caused the irritation that I speak of. I didn't try to talk with her, I wanted her to keep quiet and when I saw she was inclined to be irritable and I sup-

pose that might have irritated her, when she found I wasn't inclined to talk. It was twilight, there wasn't any light in the room and she kept on trying to talk and I tried to dissuade her, I wouldn't answer her, I suppose that irritated her. I didn't say anything to irritate her, I didn't say anything, I suppose that irritated her because I wouldn't try to talk to her. I say that when Hettie Fague was in the room she would help her out with a word. My mother would start to say something and would miscall a word, Miss Fague would say, "now you mean this, don't you, you mean this". Sometimes mother would assent to it and sometimes she wouldn't. I think at the time myself and the complainant in this case went to Washington that my mother wasn't capable of taking care of her business, and Mrs. La Fetra urged me,—she must have thought so too, because she urged me to call on you first and then when I failed to get you she wanted me to see Mr. Larner. I took no further steps after seeing Mr. Larner. Mrs. La Fetra appeared to be satisfied, she never said anything more to me about it. As a matter of fact, no further steps were taken by me at all in respect to managing my mother's affairs. I didn't think that I could when Dr. Custic had refused, because it would be on his testimony alone. I didn't suppose, in view
89 of the opinion of Dr. Custis, that it would be possible for me to have my mother's affairs taken out of her hands. I don't know, perhaps I was guilty of an act of omission, probably when he saw he didn't cure her or couldn't cure her he probably might have been willing to testify. I never consulted him about it, never asked him but that once. I want to give a reason, it looks as if I didn't take any interest in her, I want to give a reason why I didn't. His son told me she would never get any better; here was a father and son I would have to make contradict one another, the father told me she would, the son told me she wouldn't she wouldn't last long either, —that's another reason why I didn't want to, I thought it would make it disagreeable, as long as Mrs. La Fetra was satisfied and the bank was paying her checks. I don't know whether she signed her checks or not, I couldn't testify to that, oh no, I couldn't testify to that. I know when I tried to get her to sign I had to hold one of her hands and I don't know whether you call that signing a check or not. That method might have been used for all I know. I don't remember that she signed a check for me in that way more than once. No, not made to me but while I was present. That was the check that the bank wouldn't pay, that was to Ed. La Fetra, and the bank wouldn't pay it and he got me to go there with him. I don't know whether I guided her hand at that time when she signed the check, but I did try to. I think before that I tried to guide her, we had a great deal of trouble. I don't think she knew she was signing a check and what check it was. I don't think she had the least idea she was signing a check, she never asked what it was or never
90 asked what the amount was, never asked. She could not read the check she was blind, she was almost blind, almost totally, I don't think she could read. I suppose we stated to her or somebody stated to her what that check was for. I don't think I had her sign a check without stating to her what it was that I was trying to

have her sign. She or somebody continued to sign her checks up to the time of her death, the handwriting looked very much like hers, I think she signed them, she may have had assistance, but it looked like her signature and it was sufficiently like hers that the bank honored her checks. I say at the time in December, 1906, I decorated her room and she appeared gratified with it, it pleased her. She expressed her pleasure. Well, her countenance, she tried to talk, say the word "service" say the word "service", "promise". I don't know whether she knew it was about Christmas time. When I came there she wanted me to go out and see the City, almost always she would insist upon my going out,—well, as near as I could understand, she supposed whenever anybody went there there was a great deal to be seen. The last time she did this, if I recall, it was sometime before,—well, I don't remember the dates of my visits down there, that is, I can't recall them, maybe every time I went down there, if I sat down there she would think I ought to be out seeing the city instead of staying with her. She seemed to indicate that by her gestures. I don't know whether Hettie Fague was in the habit of reading to my mother on account of the condition of her eyes. I saw her read,—my wife said she had read to her a good deal. She
91 never read to her while I was there visiting her; she wouldn't read to her while I was in the room anyhow, I suppose whenever she did read to her it was when there wasn't anybody there. I do not know what she read, what books or what she read to her. I say my mother was a member of the Dutch Reformed Church, she never took her letter from that Church. I don't know that she ever joined any other church, what do you mean by joining a church,—just attending the service? No, she never took her letter from this church here, her old Church. She was a religious woman, she wasn't an enthusiast she was a good woman. I can't say that she was a very active church woman, not unusual, but she averaged about like the average people. I do not recollect saying to Mr. Forrest after my mother's death when myself and Robert went to his office and the Will was read to us that that was my mother's Will, when the Codicil was read that that was my mother's Will and I wanted it carried out. I had some conversation at that time. I said the Will was her wish and that was to be carried out if I could do it. I meant the Will, not the Codicil. The Codicil was read to me at that time, but I never approved of the Codicil.

Redirect examination by Mr. McDivitt:

I say that my mother frequently expressed or made a suggestion in some way that I go out and look at the City. She did not say anything in making that suggestion, we guessed that was what she meant. She would say "service" and she would wave her hand and then someone would say "You want me to see the old Congressional Library" or something like that.

92 Dr. JOHN B. ZABRISKIE, a witness of lawful age, called for and on behalf of the complainant, was duly sworn, and testifies as follows:

Direct examination by Mr. MCDIVITT:

Q. Where do you reside, Doctor? A. 2103 Church Avenue, Brooklyn.

Q. You are a physician and surgeon? A. I am a physician, yes sir.

Q. How long have you been practicing? A. Fourteen years.

Q. Will you state what your education and practice has been? A. I was graduated from the Long Island College Hospital in '94, 1894, I was a year in the Kings County Hospital and eighteen months in Germany.

Q. In Germany? A. In Berlin.

Q. In Berlin? A. Yes.

Q. At some hospital or institution there? A. At the General Hospitals there.

Q. Have you been practicing your profession continuously? A. Since I returned from Germany, yes, sir.

Q. Did you know Mrs. Alice D. Magaw in her lifetime? A. Yes sir.

Q. Will you state what your acquaintance with her was? A. I attended her twice, I think two or three times at her son's
93 house on Ocean Avenue, she also knew me from a boy up, the last thirty years I should say, on account of knowing my father professionally.

Q. Your father was a physician? A. Yes.

Q. A well known physician in Flatbush? A. He practiced there forty years.

Q. So that Mrs. Alice D. Magaw was well acquainted with you? A. She knew me very well.

Q. Did you ever see her in Washington? A. I saw her in May, 1906 in Washington.

Q. Will you just testify about your visit there? A. I was down visiting Congressman Waldo and Mr. Magaw, her son asked me to stop in and see her at the hotel.

Q. Mr. Van Brunt Magaw? A. Mr. Van Brunt Magaw, yes sir, at the hotel where she was living and I called in there to see her.

Q. Who was there when you saw her? A. I asked at the desk to see Mrs. Magaw and I was told to wait until I saw Mrs. La Fetra, and she took me up to Mrs. Magaw's room.

Q. Now, who was there when you got there? A. In the room?

Q. Yes? A. Mrs. La Fetra, Mrs. Magaw, and I am not positive whether there was anybody else there or not, I think there was some other lady there.

Q. How long were you in the room? A. I should say
94 about a half hour.

Q. Did you observe Mrs. Magaw during that time? A. Yes, I did.

Q. Did you talk with her try to talk with her? A. She didn't seem to know me.

Q. Did you tell her who you were? A. I think Mrs. La Fetra spoke up and told who I was.

Q. How long had it been from the time you had seen her last in Brooklyn until that time? A. I should say a year, probably two, I wouldn't be positive.

Q. What was the conversation the general conversation there, if you can give it? A. You mean between Mrs. La Fetra, Mrs. Magaw and myself?

Q. Yes? A. Simply that Mrs. La Fetra said, "You remember this is Dr. Zabriskie, he is Van's Doctor" I asked her, of course, how she was, if she remembered me,—I couldn't seem to get any coherent answer from her, she smiled but wouldn't say whether she remembered me or not, she mumbled some words which it was hard for me to understand.

Q. Then did you talk with Mrs. La Fetra? A. No, not very much I tried to talk with Mrs. Magaw, she seemed to be prompted by Mrs. La Fetra.

Q. You knew that Mrs. Magaw was ill before you went to Washington? A. I had been told so, yes.

95 Q. Can you describe her appearance or actions or words? A. She impressed me as one having aphasia, suffering from aphasia.

Q. Will you describe what that is? A. Aphasia is a defect of speech due to some cerebral brain lesion.

Q. Can you give us anything she tried to say or anything that she did say? A. It is hard to remember, it is two years, I don't think that I could say any word that she tried to say, no.

Q. Did you examine her professionally with reference to her condition? A. I felt of her pulse and examined her general condition, her pulse seemed to me to be pretty hard as if she was having a good deal of arterial change going on.

Q. Is this aphasia a result of some physical change or deterioration of the brain, or what? A. It is the result of arterial degeneration, general arterial degeneration.

Q. What do you say with regard to its being curable or incurable? A. It is incurable it is a progressive disease, it is incurable.

Q. What do you say as regards its effect upon her ability to attend to business affairs? A. The time when I saw her I don't think she was capable of attending to business affairs?

This question and answer objected to as the witness has not shown himself qualified to speak on the subject of her mental condition.

96 Q. Have you any other way of describing her condition, you say she was suffering from aphasia, which, did you say, is a local or primary cause? A. Aphasia is the result of other changes, of another disease.

Q. What other changes? A. Of this arterial hardening, causing probably a thrombus in the blood vessel, which would cause, the thrombus would cause a degeneration of the brain, a softening of her brain, in other words.

Q. From your observation of Mrs. Magaw and your knowledge of her condition would you say that she was or was not easily influenced by those around her?

Question objected to, witness has not shown himself qualified to speak on that subject.

A. I should say she was.

Q. What would you say as to her ability to make a valid contract relating to her property?

Question objected to on the same ground.

A. I don't think she was capable.

Q. Did you notice any peculiar movements of her hands or her body or face? A. That I wouldn't swear, I don't remember that.

Q. Did she appear to be strong and well or was she feeble? A. No, she was weak, she gave the appearance of one being physically weak.

Q. Do you know whether there was any cause for a feeling of estrangement between you and her? A. Not to my knowledge, no.

97 Q. Had she so far as you know ever before failed to recognize you? A. Not when I had seen her last, no, she knew me then perfectly well.

Cross-examination by Mr. LEIGHTON:

Q. You have been in general practice, Doctor, for about eleven years? A. Eleven years' practice, yes sir, oh, more than that, I graduated in '95,—'94,—two years after that I was studying.

Q. You haven't any specialty? A. No, I am a general practitioner.

Q. You went to Washington at the instance of the defendant, Van Brunt Magaw? A. I did not, I was asked to call upon his mother.

Q. How did he happen to know you were going there? A. I was making a professional visit at his house and suggested that his mother would like to see me.

Q. You suggested it? A. I suggested it, knowing she had been ill.

Q. You are Van Brunt Magaw's physician at that time and now? A. I am, yes sir.

Q. You never had attended professionally his mother? A. I had at his home twice.

Q. When? A. In, I think, two summers, I can't tell you the exact dates, I think they were one or two years before this time, two years I should say, before this time I saw her in Washington.

98 Q. That was the last time you saw her prior to this call? A. Prior to this time in Washington, yes.

Q. You say you were there probably half an hour? A. Half an hour, yes sir.

Q. Are you able to state that she did not recognize you or that you cannot tell from her appearance whether she did or did not? A. I don't think she recognized me.

Q. What makes you think so? A. Simply because she didn't seem to know who I was when I went there.

Q. She didn't speak your name? A. No, she did not.

Q. You didn't prescribe for her? A. I did not.

Q. You didn't go there for the purpose of prescribing or treating her? A. I did not.

Q. Did you notify her attending physician that you were coming and were coming to have—— A. I didn't come for a consultation.

Q. But you took her pulse and looked her over while you were there? A. Simply I felt her pulse and looked at her general condition.

99 Q. You did that at the request of the defendant, Van Brunt Magaw? A. They asked me to see her, they didn't mention what I should do.

Q. And you did that? A. I did that.

Q. And reported to them the result of your investigation or examination, did you? A. I told them what I thought of their mother.

Q. Is aphasia recognized as a type of insanity, is it treated of by alienists or does it come under the general practitioner? A. I think it comes under general practitioners, alienists are called in in consultation.

Q. When the matter comes to be so there is decided—it might result in mental alienation, may it not? A. Yes, sir.

Q. Are there not very many different phases of aphasia? A. There are two that I know of.

Q. What does the speech mechanism consist of, describe it? A. It is simply the nerve centers in the cortex and in the medulla which produce the speech, which are the centers for the producing of speech.

Q. It may be the result of a defect of the transmission of sound? A. No, not in aphasia,—it may be due to that, yes.

Q. Isn't there a visual aphasia as well as an auditory aphasia? A. Yes sir.

100 Q. And if there is a defect in the transmission of the sounds that wouldn't necessarily involve the mental condition, would it? A. If there was a defect in the sound, no.

Q. What causes aphasia? A. It is due to some disease of the speech centers.

Q. Well, how many speech centers are there in a person? A. The centers are right in the medulla, I couldn't tell you how many.

Q. Where does it center? A. The- center in the medulla,—in the cortex I should say.

Q. What do you mean by the "cortex" what is the cortex? A. That is at the base of the brain, it is one of the parts of the brain.

Q. Does it center on the left lobe of the brain, the left side or right side? A. In the center.

Q. In the center always? A. Yes.

Q. Is there any disease in which it is liable to occur? A. You mean aphasia?

Q. Yes? A. Yes, we have the arterio sclerosis, it can also occur in syphilis.

Q. Are there any other diseases in which it is liable to occur? A. Not that I know of.

Q. Will you describe, Doctor how language is acquired? A. By being taught what visions mean, for instance, if you see a
101 thing you are taught to speak it what that means to you, by imitation.

Q. By a sort of a creation of a word memory? A. Yes.

Q. Describe the process by which speech is taught to a child? A. By seeing an object and trying to tell them the name of that object and they speak it out, objects cause a mental impression which the speech center imitates.

Q. What are word memories and motor memories and visual memories? A. Simply, I should say memories of what they produce on the speech centers.

Q. The same with motor memories? A. Motor memories are,—no,—of course, that is a—a motor memory is a memory for an action.

Q. Well, before there is any action, there must be some memory that would revive or call into activity the motor muscle? A. To produce that?

Q. To do any particular thing? A. That action, yes.

Q. Say what is meant by the term "word image"? A. Image I suppose is what it produces on the visual centers.

Q. Where are these stores, where are these brain images stored or centered—the object that it produces on the visual centers——

Q. Where are these stored, where are these brain images
102 stored or centered. A. I think they are stored in the cortex.

Q. Where is that? A. The base of the brain.

Q. Medulla, that you have spoken of? A. Yes.

Q. What is apraxia? A. That I don't know.

Q. How do persons afflicted with apraxia act? A. I don't know.

Q. Do those symptoms extend to other centers than that of sight? A. Which symptoms?

Q. The symptoms for incapacity, for instance? A. Yes.

Q. To that of hearing? A. Yes.

Q. And feeling? A. Yes.

Q. Sense of touch? A. Yes.

Q. Extend to all of those? A. All of the senses.

Q. Does apraxia generally occur alone, or don't you know? A. I don't know.

Q. On what side of the brain is the lesion supposed to exist, right side to the left, or the hind or the fore side. A. The lesion of aphasia?

103 Q. Yes? A. It is on the same side as the hemiplegia is.

Q. What are the most important forms of apraxia? A. Apraxia, I don't know.

Q. Is blindness of the mind's eye functional or transitory or how otherwise? A. Blindness of the mind——

Q. Mind's eye, that is a phrase doctors use, isn't it, in connection with aphasia when they can't recall a word? A. Yes.

Q. Is that functional or transitory? A. I should say functional.

Q. It it associated with other forms of mental disturbance? A. Yes.

Q. Can it occur alone? A. It can.

Q. Where is the lesion in cases of mind blindness? A. It is also in the medulla.

Q. What is mind deafness? A. An inability to comprehend what one hears.

Q. That is, having no mental conception,—it hears the sound of anything but arouses no mental conception—— A. Yes.

Q. (continued). Of what causes the sound? A. Yes.

Q. Is that what you mean? A. Yes.

104 Q. What is word deafness? A. The word itself gives no conception to the brain of what is meant by the word.

Q. That is, a party may know what they desire to say but are not able to recall the word? A. To say exactly what it means.

Q. Is that what was the matter with Mrs. Magaw? A. Yes, I think so.

Q. She knew what she wanted to say but couldn't get the word that she wanted? A. Yes, in aphasia it can be that.

Mr. McDivitt: He is asking you whether that is what was the matter with Mrs. Magaw.

Q. Does it occur alone or is it accompanied with other diseases? A. It can occur alone.

Q. It it usual for it to occur alone? A. You mean this form of aphasia?

Q. Aphasia? A. Aphasia, alone by itself, no, I don't think so.

Q. Usually occurs with other diseases? A. Yes.

Q. Produced by other diseases? A. Yes.

Q. What diseases most frequently occur with it? A. Arteriosclerosis.

Q. Where is the lesion for mind deafness located? A. In the medulla.

Q. Always. A. Yes sir.

105 Q. That is the base of the brain? A. Yes.

Q. That is back of the head? Yes, here in the medulla.

Q. What is motor or ataxic aphasia and what is its cause? A. Ataxic aphasia is the form of aphasia when they can't say words they wish to, they have no connection between the words they mention.

Q. They know what they desire to say but can't frame the speech to suit the thought, is that it? A. They can do it when it is repeated to them.

Q. That is they recognize that as being the thing they want to say when it is repeated? A. At times, yes.

Q. That is the way of course, unless their mind is disturbed—— A. Yes.

Q. (Continued:) If their mental condition is right they can see what is repeated to them is what they desire to say, isn't that so? A. At times, yes.

Q. Does a patient so afflicted understand what is said? A. I don't think so.

Q. Does he recognize objects that are shown to him? A. If he has the sensory aphasia he does not.

Q. Suppose there is no trouble with his visual nerves that transmit sight to him, he sees an object and there is no obstruction there, no disturbance there, if it don't arouse any mental thought,

106 if there is no difficulty with his visual nerve that transmits the vision to his mind's eye then it would arouse some mental

thought unless his mind itself was affected wouldn't it? A. Yes, unless the mind is affected.

Q. So there might be a disturbance here in the nerve which transmits, for instance, an object of vision to the mind and the mind itself be sound, isn't that so? A. You mean in other words, the optic nerve may be all right?

Q. May be dist*ru*bed or obstructed and yet that would not necessarily involve the mental operation? A. No.

Q. May a man with a knowledge of different languages lose the power of expression in one of them and retain his power in others? A. Yes, that is possible.

Q. May forget speech, have a failure of memory in respect to some language and still retain his recollection of some other language, isn't that so? A. Yes.

Q. And be able to express his mental conceptions clearly in another language? A. Yes.

Q. Isn't that so? A. Yes, that is true.

Q. So that after all, it is a failure of memory, isn't it, that causes these manifestations generally, a failure of memory? A. That causes manifestations of aphasia?

107 Q. Yes? A. No, I don't think, not a failure of memory, it is a failure to comprehend and to be able to say the words.

Q. If it is a failure to arouse the word memory, he has forgotten it for the time, the special word he wanted to recall, that don't necessarily involve the mental faculties, doesn't it? A. If it is aphasia it does because it is due to a disease of the brain.

Q. Aphasia is itself a disease of the brain? A. As a result of the brain, disease of the brain.

Q. Aphasia is caused by disease of the brain? A. Yes sir.

Q. Is that what you mean to say? A. Yes.

Q. Can a person afflicted with motor aphasia read? A. Sometimes, it is rather difficult, it can be taught.

Q. Can be taught? A. Sometimes.

Q. That is, if they know how to read, they have simply forgotten how to frame the letters, but they can be re-educated, is that what you mean re-taught? A. Sometimes they can, not always.

Q. They can unless their mental faculties have failed, can they not? A. Unless the brain has so degenerated.

Q. And it doesn't always follow because a person has lost the power of expressing themselves in selecting the right word that their mental faculties have failed, does it? A. Not al-

108 ways.

Q. Does it usually involve the mental faculties? A. That I wouldn't say, I am not experienced in that.

Q. Enough to know? A. No.

Q. Is there a special writing center? A. There is.

Q. What is mixed aphasia or paraphasia? A. That I am not competent to say.

Q. What is the cause of this form of aphasia? A. Due to probably a clot pressure causing a diseased condition of the brain.

Q. Where is the lesion in such cases? A. It is on the opposite,—the same side, the same side as the hemiplegia.

Q. The same side as the hemiplegia? A. Yes.

Q. That may be on the right or left side? A. Yes.

Q. Hemiplegia means half paralysis? A. Half paralysis.

Q. Are the problems of aphasia simple or complicated? A. Complicated.

Q. Is the diagnosis of aphasiac conditions easy or difficult? A. Not to locate, to locate the aph-sia is difficult, to locate the exact lesion is difficult.

Q. To determine the kind of aphasia, isn't it difficult? A. That's what I mean it is difficult.

109 Q. What tests should be applied to determine the kind of aphasia, what tests? A. Tests to find out whether it is a question of repeating different words.

Q. Whether it is word a*hp*asia or visiual aphasia? A. Or sensitory aphasia.

Q. What tests would you apply? A. For sensitory aphasia, for instance, the ticking of a clock to see whether the person knew what that was, understood it.

Q. Are you familiar with the practice of medicine by Osler? A. I am.

Q. Is he recognized by the medical profession as a standard authority? A. He is.

Q. Do you know how many tests he gives as necessary to be applied in order to determine—— A. No, he gives a good many.

Q. You don't recall whether he says it is a difficult thing to determine what kind of aphasia? He says it is difficult sometimes to determine the location.

Q. Location of the lesion? A. Yes.

Q. But not difficult to determine—— A. Yes, difficult to determine which form of aphasia it is at times.

Q. You did not apply any of the tests that Mr. Osler gives 109½ in his work, did you? A. No, I did not.

Q. Now, why do you attempt to speak then, with the examination that you made of this woman, why do you attempt to say that you think she was incompetent to make a valid deed if you did not apply any of these tests that Mr. Osler has given to determine what the character of her a*hp*asia was? A. Simply her general condition gave me that impression.

Q. May not a person have word blindness or deafness so that they comprehend perfectly what they desire to say but are not able to select the words to express their thought? A. I don't think so.

Q. People frequently in speeches make a mistake in a name, use one name when they mean another? A. Yes.

Q. Isn't that a case where the mind has slipped, case of mind failure? A. Yes.

Q. Memory failure? A. Memory failure, yes sir.

Q. And that may occur with a person of the strongest intellect, may it not? A. Yes, sir.

Q. As people get older their memory of words, of names, for instance, is apt to fail—— A. Yes.

Q. (Continued:) Before memory on other subjects? A.
110 Yes.

Q. Does that necessarily involve the mental faculties, a failure to recollect names? A. Not necessarily.

Q. A person may forget the name that he desires to speak, name of the person he desires to speak, and still be competent to transact business, may he not? A. Yes,—you mean a healthy person?

Q. Yes, I mean any person, whether they are healthy or sick? A. Yes.

JOHN B. KOUWENHOVEN, a witness of lawful age, called for and on behalf of the complainant, was duly sworn and testifies as follows:

Direct examination by Mr. MCDIVITT:

I was acquainted with Mrs. Alice D. Magaw in her lifetime. I always knew her from about five or six years old. I lived in the same town with her, I went to the same church she did, and always visited the family off and on. I visited her at Washington. The last time that I visited Mrs. Magaw in Washington we went on between the holidays of 1905 and 1906. My wife and Mr. and Mrs. Van Brunt Magaw were with me. When I saw her, Mr. Van Brunt Magaw and his wife were in the room, I guess that was the only one. I don't think I saw the nurse at all, I don't remember that I did. When we came in Mrs. Magaw said "Do you know John", and she kind of looked at me and she didn't say whether she did or not, she didn't call me by name but she commenced to say something, but

I couldn't understand what it was. She didn't appear to be
111 well, you could see she was a sick woman, looked quite feeble.

I tried to talk with her but I couldn't make out what she meant to say, she had certain words she put in every once in a while, but I don't remember what it was now, it did not make any sense. She made gestures, she would keep her hand going once in a while as if she wanted to tell us what we ought to see or something that way. She didn't call me by name, I don't know whether she knew who I was or not. She would say a few words, you would think she was going to tell you something she knew about, then she would get off on something else. What she said did not make sense. I suppose the first time I was with her about half an hour, this first day I mean. The next time we were in there a little while, then we went in to bid her good-bye before we came away. She talked some time, she always had something to say, but you couldn't make nothing out of it, any meaning.

Q. From your observation of her at these times and your attempt to converse with her, what is your opinion as to her capacity to attend to business affairs?

Question objected to, the witness has not shown such knowledge

of Mrs. Magaw's condition as entitles him to give an opinion as to her ability to take charge of her affairs.

A. I don't think she was fit to do any business with.

Cross-examination by Mr. LEIGHTON:

The subjects of my conversation were only asking her about her general health and different things about the weather and
112 one thing and another, you know, I had no business dealings with her or nothing of that sort. I remained there the first time about half an hour, and she seemed from her motions to indicate she wanted me to see certain parts of the city, and she indicated to me that she seemed to be kind of wandering in the conversation. That is, she would start off all straight and then lose some word. I think that appeared to irritate her. She appeared to be conscious of the fact that she couldn't get out what she wanted to say, and that's the way she impressed me.

Q. While she was conscious of what she desired to say yet she couldn't frame it in speech, couldn't select the word she wanted to express her thought, that's the way she impressed you, wasn't it? A. Yes, she started to tell you something, and she didn't end, lost herself and you didn't know what she meant to say to you. Then she would start on some other conversation, some other subject. I gathered not only from what she said, attempted to say, but also from her gestures and words that she wanted us to see something but I couldn't say if it was objects in the city or what, I thought it kind of worried her and I was glad to get out as soon as I could.

By Mr. MCDIVITT:

She didn't try to say very much while we were there.

JOHN C. GILES, JR., a witness of lawful age, called for and on behalf of the complainant, was duly sworn and testifies as follows:

113 Direct examination by Mr. MCDIVITT:

My residence is 1917 Newkirk Avenue, Borough of Brooklyn. I visited Mrs. Alice D. Magaw the latter part of April, 1907, at her room in La Fetra Hotel in Washington. The nurse was there with Mrs. Magaw and I was only there for a short while and during that time I had a conversation with Mrs. Magaw and Mrs. Magaw didn't seem to,—well, I couldn't understand what she said. She tried to speak several times. I don't know what she attempted to say because I couldn't understand what she said, about all I really could understand was the word "service", I could understand that distinctly, others I couldn't really understand. She sat up as I came in and Miss Fague introduced me to Mrs. Magaw and explained that I was a young man from Flatbush come to see the girls and that she knew Mrs. Magaw would be very sorry that they had left. I came especially of course, to see the young ladies and they had just left before I got there. I couldn't understand anything she said except a few words now and then and the main thing that impressed it upon my

memory was "service". I tried to talk with her and understand what she said, but Miss Fague would interpret all the answers. In fact I had all the conversation with Miss Fague because I couldn't understand anything that Mrs. Magaw said.

Cross-examination by Mr. LEIGHTON:

I am not any relation to the Magaw family. My interview in the presence of Mrs. Magaw lasted, to the best of my knowledge and belief, about fifteen minutes, possibly a little more. She
114 got up as I came in. I had never seen her before. She was presented by Miss Hettie Fague. She was the only one that was there during my visit. The subject of the conversation was that the young ladies had left. I didn't go there to see Mrs. Magaw. Mrs. Magaw did not remain standing all the time during my stay there. I stayed long enough to sit down. There were several subjects talked about. Mrs. Magaw tried to express herself several times, and what she attempted to say was interpreted by the nurse.

Q. From the interpretation of her answers by Miss Fague were her answers responsive to your questions or to the subject of your conversation? A. Miss Fague made the answers. I couldn't tell what Mrs. Magaw meant.

Q. Were any of her words distinguishable or intelligible to you? A. The word "service" was impressed upon my mind so I will never forget it because everything that she tried to say all her sentences that she made ended that way, that word always ended nearly everything she said or tried to say. I don't remember that Mrs. Magaw appeared to be annoyed or irritated that she did not express herself as she desired.

JOHN S. GARDNER, a witness of lawful age, called for and on behalf of the complainant, was duly sworn and testified as follows:

Direct examination by Mr. MCDIVITT:

I reside at 1250 East 40th Street, Brooklyn, N. Y. I am a minister of the gospel. I am now the Pastor of the Flatlands
115 Dutch Reformed Church. I knew Mrs. Alice D. Magaw in her lifetime. I knew her as being her pastor and going there frequently in times of sickness of her husband and at other times, visiting her house. I knew her husband,—buried him. Both he and Mrs. Magaw were members of my church they took an interest in church affairs. I have been Pastor of that church continuously since the death of Mr. Robert Magaw, who died in June, I think, 1887, I have been there since 1883, in July. To the best of my knowledge and belief the records of my church show that she was a member of my church at the time of her death, she hadn't taken her letter away from my church. When Mrs. Magaw visited her family in Brooklyn, I sometimes called on her, I don't know as she was ever to see them but what I called on her,—at least I tried to make it a point to call on her every time. I was well acquainted with her. I saw her last sometime in January, 1907, and she died I think in August, 1907,—some six months before. I saw her at

the La Fetra Hotel where she lived in Washington. I saw her in her room, she was sitting up in a chair and she certainly appeared to me as enfeebled in body and to a certain extent, of course, in mind, she certainly was. We talked there, I rather think in that conversation as far as it was possible, I did the most talking, I wasn't there but a little while, I wasn't well and coughed all the time and my opportunities of seeing her possibly weren't as good as they might have been at some other time. I remember a subject of conversation between us. I recollect that I talked to her about her son's family, I recollect that I talked to her about quite a number,—some, at least, of the older people in the parish with
116 whom she had been well acquainted, I recollect those points very distinctly. She spoke,—we talked together and she didn't say so very much. The only sentences that I can remember that she uttered was simply a sentence,—the church had built a new parsonage and she asked me about that parsonage, if we occupied it or some such expression as that, and I remember that, because I was so surprised at her asking it, and because quite a great deal,—I think I may say the greater part if not all of the conversation beside that,—was somewhat to me confused, I couldn't get hold of it. As I recollect it it seemed to me that in three-quarters, certainly half of the sentences that she used she spoke she used the word "service," but not in a way intelligible to me. In her general actions and appearance there was a difference at this interview from what there was when I had known her in Brooklyn. She had manifestly failed, very markedly,—it always seemed to me and I think I am right, that Mrs. Magaw was a woman above the ordinary in intelligence, &c., she compared very, very poorly this time.

Cross-examination by Mr. LEIGHTON:

I couldn't state exactly how long my interview lasted with her, but it was a short time, anywheres from ten possibly to twenty minutes. I was there but once in 1907. There were certainly two people if not another one in the room besides Mrs. Magaw, but I am not sure about that, but there were two and I think they were a Mrs. and Miss Love. My recollection is that Miss Fague was not there, they said she had been excused and gone out on a walk. I don't think Mrs. La Fetra was present, and it seems to me that there was a third person
117 there but I am not sure about it, if there was, it might have been she.

Q. This remark she made about the parsonage at Flatbush was a matter that she introduced herself, wasn't it? A. As far as I recall it was.

Q. That is, it hadn't been the subject of your conversation previously? A. I don't think it had.

Q. As a matter of fact, was there a parsonage, new parsonage? A. Yes. It had just been finished. The remark came out and how it came and in what conjunction I don't know, but there was a remark made by her in reference to that parsonage. I can't say that during her previous visits in Brooklyn she knew of the fact of there being a new parsonage there or that in some way she knew, but, of course,

she must have gotten hold of it somehow surely. I can't tell when was the last time I saw her before January, 1907, but I think it was when she was on, the last visit that she made here to Brooklyn, to Flatlands. I think it was somewhere in the summer of 1905. She was interested in church work matters. No special branch of it, interested in all as a general thing, and her husband was likewise a member of my church, a prominent member. I always thought the relations of Mrs. Magaw and her husband were very close relations. She thought a great deal of her husband. I don't really know whether she was a woman of strong will, disposed to decide matters and to carry out what she purposed. I know oftentimes people
118 of strong intellect, are people of strong will,—and I wouldn't give much for any person who didn't have a strong will back of them. I don't know whether she appeared to understand or appreciate my conversation when I was talking with her, from her conduct and manner in January, 1907. I certainly did not get her conversation and how much of mine she understood I wouldn't want to say. I know I left and it weighed on me as it had once or twice before, as it did on leaving Mrs. Magaw I had a feeling of sort of sorrow that she had seemingly to me changed, deteriorated. She was an old woman, she was in the eighties. Comparing her with several other parishioners in my church who are over eighty and over ninety, I should say the deterioration was other than such as is usually incident to age. The deterioration that was in Mrs. Magaw was decidedly more than the deterioration that comes from age. I don't know that anyone else attempted any conversation with her while I was present, but these people who were present they interpreted to me what she said or was trying to say, or at least I presume they thought they were interpreting for her. I imagine they were used to being with her.

Q. From their rendition of what she said was it responsive to the subject of your conversation as far as you recollect? A. You mean by that,—well, of course, the way they tried to interpret it, the way they tried to interpret it it came in pretty fairly, pretty fairly well, but whether they knew what she was trying to get at I am
119 sure I don't know. I imagine that they were doing simply the best they could in making their answers and whether they made a mistake or not that's all there was to it. They had no motive of doing otherwise as far as I know. I didn't know these people who were there and I don't know as I have mentioned the right names, but I think I have. That is the last I saw of her.

Redirect examination by Mr. McDivitt:

In my talk with her about the new parsonage at Flatlands she did not use the word "parsonage" my recollection of it is she used the word "house" but I am not sure, but that is my impression. In talking about it I think she put words together to make a complete sentence by herself, and as I recall, I said before, that was about the only thoroughly complete thing that was like her old self and that's the reason that impressed itself so upon my mind.

Q. Did these other people there help to interpret what she said

about the parsonage, as about other things? A. I believe they did as it went on because there was scarcely a sentence, as I recall it, but what they did help in interpreting.

Mrs. MATILDA W. MAGAW, a witness of lawful age, called for and on behalf of the complainant, was duly sworn, and testifies as follows:

Direct examination by Mr. McDIVITT:

I reside at 1486 Ocean Avenue Brooklyn, N. Y. I am the wife of Mr. Van Brunt Magaw, one of the defendants in this
120 action. I was very well acquainted with Mrs. Alice D. Magaw, my husband's mother. Always during the summer she visited us in Brooklyn during the time that she resided in Washington, every summer. She generally came on about in May and she stayed as late as December,—generally would go home with her. She always corresponded with me or my family, regularly with one member of the family,—either my husband or my children or myself. I or my family regularly replied to her letters. Myself and my family visited Mrs. Magaw in Washington. I remember the time when my husband received a telegram from Washington suggesting his going there about mother. I visited Washington after that time. The first time I was there I don't remember whether Miss Fague was there or not because it was right after it happened, this trouble, then she talked very little at that time. I think she was sitting up. I don't remember about the first time I was there whether I talked with Mrs. La Fetra or not. I found mother in a way she couldn't converse with me at all, we tried to talk together but it was very hard to understand her and she would use some certain word, and we would have to help her out, either I or whoever was in the room with her, I don't remember who it was. I tried to talk with her. I don't remember anything that she tried to say or that I said, just at that time. I don't think she asked me any questions to my remembrance. She tried to talk. She couldn't ask how we were, couldn't call us by name, couldn't ask how any of the family was,—I don't remember that she asked anything, only as we were talking together she would laugh and say "Yes", and perhaps she would use different words, "promise" or
121 there was a number of words. I don't seem to remember whether Mrs. La Fetra was in the room at any time during this visit with Mrs. Magaw. On this visit I was there one or two nights, I am not positive. On my next visit in October I didn't find her any better, Miss Fague was there, I think, and when we came in we asked her how she was and of course Miss Fague would step right forward and answer us for her, and if I asked her any question she would try to say "How is the promise," and always make her hands go and I would say, "Do you mean Van"? "Yes". "And how are they"? "Who do you mean?" "The promise" I would say "Do you mean the children?" "Yes". Or I would have to mention each one by name, she couldn't answer a question in that way. She never repeated any names after me. I don't

think she knew whether I was her daughter-in-law or not, if she did she didn't show it to me at all, she didn't call me by name or she didn't ask who I was. I had a talk with Miss Fague or Mrs. La Fetra at this time. I cannot recall anything that was said about Mrs. Magaw or otherwise, nothing particular, in general I always asked how she was and they would say she was better, but I couldn't see the difference myself at all, she couldn't ask me any questions, if she asked me she would say "How are the Blossoms", sometimes it would be "Blossoms" or "Promise", nearly every time I was there there was a different word she used and that word she would use in every sentence two or three times. She tried to talk all the time. In December, 1905, we were there for just a call, Mr. Magaw, Mr. Kouwenhoven, and I were there. The Mr. Kouwenhoven

I refer to was the gentleman who testified here this morn-
122 ing. We had very little conversation, we were talking together more, she would ask me as she always did how the "promise" was,—she couldn't ask any direct question at all. Miss Fague did not at that time say anything about Mrs. Magaw. I wasn't there after that again until,—I think it was in April, 1906 if I am not mistaken. I think that was the visit when she wanted to know about something at home and I suppose she talked with me for an hour to find out about some certain thing, it was "blossoms", she would throw her hands "Why don't you tell me you *do* know",—"I don't know, mother what you mean",—"You *do* know, is blossom or they are all over". I would say, "Do you mean the celery",—I knew she was very fond of it,—"No". "Well, do you mean" the different things I mentioned,—"No, you know, I mean the blossoms, no, all over, the blossoms". "I don't understand you"?—she would say "Oh, you know, you do know", and she became very much excited over it; I can't say she was exactly angry but she was very much provoked with me. At last after a long long talk with her I said "Do you mean the grapes",—"Yes",—whether she meant the grapes or not I don't know. I don't think there was anyone but mother and myself in the room at this time. During this interview she did not utter any sentence by herself which I could understand, not without my help, when she would ask a question we always had to help her out. During the period from September, 1905, until the time of her death she did not repeat my name, or call me by name. My name or the names of my family were mentioned in her presence during that time, it was mentioned often to her; that was

down to April, 1906. I was there seven or eight times, but I
123 can't give you the dates exactly. I was there in November, it must have been 1906. I visited my mother during the year 1907. I was there,—let me see, it was about a month before she died, in July, on the 16th of July 1907. I visited her before that. I was there before that in that year. I think I was there in April, if I am not wrong. I can't say whether Mr. Magaw was with me then or not, in April 1907, but I have never been there alone, there has been one of my family with me always, but I can't say in April. I remember there was one time when I had a conversation with Mrs. La Fetra about mother but whether it was just at that time I

can't say. It was prior to Mrs. Magaw's death. We were speaking about her condition and I told her I wanted her to come home with me. We wanted her to come home with us and Mrs. La Fetra said she would be satisfied,—the way I understood it,—to have her come and mother wouldn't consent, and any way I spoke,—whether she understood me or not,—Mrs. Magaw would say, "No, no", and I tried every way to induce her, I said to Mrs. La Fetra,—she called me down in her room,—I didn't notice any change in Mrs. Magaw from the first time I went there, any change in her talk, she couldn't make me understand her, if she asked a question I would have to help her out every time. I did not have a conversation with her regarding any matters in Brooklyn besides what I have detailed, not to my recollection just now. I have talked to her about the homestead being sold, that was the last time I was there, that was just near her death. She did not talk at that time. She asked we about
the "promise",—that was the time she used the word
124 "promise" altogether, what they were doing with the
"promise". I was left alone with her that evening, my daughter was out with Miss Fague, she asked me what about the "promise". I said "What do you mean"? "That promise over there, that promise",—I had told her everything that happened around home, which I usually did, I said "Do you mean the old homestead". "Yes". I said "It has been sold, Mr. Henderson has been living there, it has been painted and remodelled and it looks quite different". She says "That's good". She said "Why didn't he tell me?" I said "Who?" "He." I said "Who do you mean, Fred?" "No". I said "Do you mean Van"? "Yes, why didn't he tell me". I said "Tell you what"?,—and she couldn't answer any more. Then she would say, "No, not that, I mean the promise",—she would throw her hands over,—"Those promises there", and I said "Do you mean the ground being sold?" "Yes". I said "That has been sold." "Why didn't they do it"? I haven't any idea yet what she wanted, I tried to explain it and seemed to satisfy her and she would ask me the question right over again, and two hours I sat with her that night, she began to get closer and closer to *to* me until I began to get very nervous and was very glad when they came in. I said to Miss Fague "Mother has been worrying me about two hours about something I don't understand". Miss Fague said "I am very glad you are in here she has been trying that with me a number of times, but I don't know what she wants and I never found out". I did not read to my mother while I was there. I found Miss Fague reading to her one morning when I came
in from breakfast. As I went in the room she was reading
125 from the Bible, I said I would step out for a moment; she
said "Oh, no, she doesn't know a word I say", I said "She don't understand you?" "No" she said, and mother laughed and never paid any attention that they had been reading to her at all, and we all talked together, the book was closed and no more said about it. On my visits to Washington Mrs. La Fetra made things pleasant for me, she always made things pleasant. Mother always paid our board, with one or two exceptions, when I went down. Of

course after she was stricken with this hemorrhage of the brain she never offered to pay our board, I would go down to the desk to pay it and the Clerk would say, "No, your mother, it would break her heart to have you pay it". I said I didn't want to do that as mother had said nothing about it in any way. She wouldn't let me pay the board. Now, when I came up Mrs. La Fetra would say, "I want to get some money from Mrs. Magaw to pay for your meals at the restaurant", I didn't want it; then Mrs. La Fetra spoke to Mrs. Magaw and said "Now, Mrs. Magaw,—" (I was awfully ashamed and talked to my daughter and wouldn't listen to her),—she would say "Did you hear what she said, 'She can pay it herself' but never mind, I'll get the money out of her after a while". Mrs. La Fetra said Mrs. Magaw said "She can pay it herself" and I would pay it. Then Mrs. La Fetra said, "Never mind, I will get it out of her after a while. I said "if you do, Mrs. La Fetra, I will not take it". I have heard mother use profane and indecent language. I have been told she used it occasionally, but I have heard indecent language more than once, during this period,—it wasn't Mrs. Magaw at all
126 who would speak that way. Mrs. Magaw talked very little about her interest in mission work in Washington. Miss Fague said very little about it. She mentioned once she had a bed in one of the hospitals; Mrs. Magaw never mentioned it. I don't think she had anything to do with mission work before she went to Washington, never at home, I know we had a lady calling, an intimate friend of hers wanting us to do something for missions, and she gave $1, that was all. I have never known her to be interested in them any way from the time I was first acquainted with her, and I don't think she was much, before she went to the La Fetra hotel.

Q. Now, I will ask you what, in your opinion was her mental capacity for attending to business of any kind at any time during the period from September, 1905, to the time of her death?

Question objected to as the witness is not shown to be properly qualified to give an opinion touching her capacity.

A. I don't think she could attend to any business at all, I am positive she could not, she couldn't talk and couldn't ask a question, couldn't call a person by name,—I don't see how she could attend to business. Her sight was very poor. I have talked to Miss Fague about her sight. Miss Fague said the same as I do, one eye, of course, she couldn't see out of it at all and the other one was affected. Mrs. Magaw sometimes used a magnifying glass to read by, but latterly she couldn't read at all. Miss Fague said she couldn't read, that's all, whether it was she couldn't see, I couldn't tell you that.

127 Cross-examination by Mr. LEIGHTON:

When my husband received this telegram from Mrs. La Fetra telling him of his mother's condition, I didn't go on with him right away, I went shortly after, only a short time after it, he and I went again to see her. At that time I stopped at the hotel. We re-

mained there either one or two nights, I can't say. I was with mother most of the time I was in Washington. I can't say whether Miss Fague was there at that time or not. She had one or two nurses but whether it was Miss Fague at that first time; I don't remember the names of the nurses. Dr. George Custis was then attending her. I believe he had been her physician prior to this time. He had been in attendance upon her ever since she lived in the City of Washington. The last time I was there she had his son to consult with him, I was in the room at the time he came in. I think the son's name was J. B. Gregg Custis. Those were the only physicians she had so far as I know during her last illness. The condition at the time I first saw Mrs. Magaw was such as to require the attendance of a nurse nights. She couldn't,—they had to watch her all the time. She was sitting up when I was there. Oh, I don't think she sat up nights as well as during the day I didn't stay with her nights, myself. I wasn't in the room with her nights, I remained with her what I did remain, during the day time. There was always someone in the room with her at night, slept on the couch, I think a hired nurse. I conversed with my mother-in-law at that time. She never could finish her sentence. I would help her out. And that was my only way of conversing with her. She would say
128 "How is—" and I would have to help her out.

Q. Then you say you would have to guess at what she desired to say and you would mention several things and finally hit upon the right thing and she would assent to it, is that the way it was? A. Not always.

Q. Did that habit continue so long as you saw her up to the time of her death? A. Always.

Her condition in that regard did not grow better or worse. I never saw any change. She couldn't talk any better, and couldn't ask questions. The old homestead was her husband's place. That went by will to my husband's brother, to mother's youngest son, under Mr. Robert Magaw's Will. He gave it to his youngest son; mother, of course had a right there. I couldn't understand what she meant, I didn't find out although I spent two hours with her. I spoke to her about the sale of the place. She asked me how something was getting along, how the "promise," and I asked everything and finally I mentioned the house. I think she had known about the sale of that house prior to my telling her. She was told at the time it was sold, whether she understood it or not I can't say. I don't know exactly the time it was sold. I don't know how long it was prior to this conversation I have detailed. She did not seem to be dissatisfied that it had been sold. I said it had all been remodelled and painted up and it looked like a new home, and she said, "That's good." I don't know if she knew what I meant
129 or not. This incident that I have spoken of about my mother-in-law's declining to pay for my board there was the last time I was at the house prior to her death, the last time I saw her alive. During that visit we were there three nights. Oh, I spent most of the time with her. She tried to talk, that is, made an attempt to talk with me on different subjects. As a general thing either the nurse would ask her something or I would, and she would

hear and join in. That was about a month before she died, in July, the 16th and 17th of July. Referring to the conversation that Mrs. La Fetra reported to me, I was talking with my daughter, as I said, I felt mortified to think she would ask her to pay my meals and I didn't listen to her, and Mrs. La Fetra said "Did you hear what she said"? and I said, "No," "She said she can pay it hers*lef*,—she said "Never mind, I will get it out of her after a while." I recall nothing in particular of the subjects of conversation between myself and my mother-in-law during this last interview in July, during the time of my last visit, it was only just this general conversation, family matters. I would try to tell her about each one of the family, as long as I came in she would stay up, but Miss Fague was always ready to ask questions and didn't give me a chance hardly to know whether mother could talk with me. Miss Fague was always there during my stay in July, except she went out and left me with her several times. She could not read with a magnifying glass after she had this hemorrhage of the brain, it was before that, I don't think she could read or write after that—1905. I believe she did sign her name after that, but I saw her try to sign
130 her name one day and she couldn't do it. That was either the first or second time I was there after the 10th, Mrs. La Fetra brought a check in to her and wanted her to sign it and she tried and tried and couldn't do it. It was either the first or second time after she had this hem*m*orrhage. That was 1905 I am speaking of now, she was taken on the 26th and I believe I was there shortly afterwards, and Mrs. La Fetra tried to get her to sign a check and she couldn't do it, it must have been in September. That was the only time I saw her try to write after this trouble. I know she signed her name after that, I saw checks with her signature. That's the only one I think she ever did write. At these numerous interviews she became very impatient when she couldn't express what she desired to say, sort of irritable. I don't know that she seemed to be conscious of the fact that she wasn't expressing herself as she desired. She would push up towards you, "you *do* know, you *do* know," she would say.

Q. She was conscious, don't you think that she was conscious, that she wasn't making herself understood, that she wasn't expressing herself clearly, selecting the right form of speech that she desired? A. I don't know whether I can answer that, I don't know. She was impatient. I think it was twice I heard her use indecent speech. I can't say when it was. It wasn't immediately after she was afflicted, I had been there a number of times before I heard that, I had been told she would get impatient and use those vulgar words and I had never heard it, but I did afterwards. She
131 used profanity, so I was told, but I never heard it. And I only heard this speech twice, and I can't recall the time. She would get talking and she would use those different words, the "spirit" "promise,"—whatever it was, I would try to help her out, I would say "I don't know what you mean," she would say "You do,"—she would say that every time, acting as though she was provoked, and then in her irritation she uttered this vulgarity. I heard her do it twice.

Redirect examination by Mr. McDIVITT:

It wasn't during my last visit, it was before that it must have been about 1906, because it wasn't the first two visits, she said very little then. Miss Fague told me she had used profane words. I didn't hear it, but Miss Fague said she did that often. I was acquainted with mother's handwriting.

Q. I show you "Complainant's Ex. No. 1" of May 22nd, 1908, for identification, and ask you whether or not that letter was in your mother's handwriting? A. It is her writing, that is mother's handwriting.

Q. Now, I show you "Complainant's Ex. No. 2 for ident." of May 22nd, 1908, and ask you in whose handwriting that is (handing witness paper)? A. That is mother's.

Q. Was that letter written before or after her hemorrhage of the brain that you spoke of? A. She wouldn't write a letter like that before, it must have been written after.

I found that letter among Mrs. Magaw's papers which were
132 brought from Washington. The papers were taken out,
Miss Fague took them out of Mrs. Magaw's desk at her room in Washington. I stood by, she handed them to Mr. Magaw and he put them in his suitcase and brought them home. I examined them myself after I got home and found that letter.

Recross-examination by Mr. LEIGHTON:

I have asked mother to come home to Brooklyn every time I was there, from the time she was taken with this trouble. We asked her to make her home with us prior to that time. When she first left Mrs. Williams' we didn't want her to go to the La Fetra, asked her to come with us, Mr. Magaw wrote and I wrote. She said the climate was better for her in Washington, her health was better, we offered her a home told her we offered her the choice of a room, she thanked us very much for it, she would spend the summers with us, but she would rather be there in the winter. We didn't want her to go to the La Fetra Hotel. We didn't think it was any place for her. We told her so, we told her it was no place at the hotel for her. We thought she was better off with her children. That she would be better cared for by us and by her own family than she would with strangers. But she always steadily resisted going home. She didn't want to come only for the summers, she always spent her summer with us until 1905, when she was stricken, she was there that summer. This paper that was marked "Complainant's Ex. No. 2" of May 22, 1908 for identification, I found among the papers
of Mrs. Magaw. They were delivered to me by Hettie Fague
133 after her death. There were no others having her handwriting upon them, none that we thought were written after she had this trouble. There were other letters, I thought this one was written after she had this hemorrhage. There is no date upon it and nothing to indicate when it was written. I don't know as a matter of fact when it was written. According to the writing on the letter she evidently couldn't express herself. None of the other

letters I found were dated after this trouble in 1905, no, not one, she never wrote to us after that. She did not write to anybody after 1905.

MABEL W. MAGAW, a witness of lawful age, called for and on behalf of the complainant, was duly sworn and testifies as follows:

Direct examination by Mr. MCDIVITT:

I reside at 1486 Ocean Avenue, Brooklyn, N. Y. with my father. I am not married. I am a granddaughter of Mrs. Alice D. Magaw who formerly lived in Washington and died there, and was well acquainted with her. She visited our house in Brooklyn many times. She spent all her summers with us and every spring and fall with my sister and I went down there, very nearly, with a few exceptions. After I heard that Mrs. Magaw had been taken sick in 1905, I made my first visit to her, in April, 1906, I think. At that time she was very much changed; when we went in she usually,—she had always before come up to us and kissed us and appeared very glad to see us and asked after all the family,
134 and this time she sat in a chair by the window and she seemed very much dazed, she didn't seem to realize who it was. I think she knew it was some one dear to her, we went up to her and we kissed her and asked her how she was, and she couldn't tell us, and Hettie told us she was very much better and we tried to imagine that she was, but she didn't seem so to us. After this visit we were there two weeks more or less. We stayed at the hotel, we had rooms on the same floor with grandma, we saw her frequently during those two weeks, we were in her room all day long except when we were out. She formerly,—she had been very much interested in everything we did, and we tried to tell her what had gone on since we had seen her before, but it seemed to worry her, she couldn't understand what we said so we made up our minds we would tell her just as little as possible, she couldn't understand. If we were going out anywhere and we told her, she would be awfully afraid that we couldn't get there the right way, and she would try to tell us,—take this car and that car,—couldn't tell what she meant. One day we were going down to the Capitol and she seemed to realize we were, she understood we were going there, we told her and she said "Well, take the F Street," No, she said "Take the Spirit" and it will take you to the Heavenly Gates,"—something of that sort,—you could never understand exactly what she meant. She pointed out of the window down toward the Capitol. She talked of lots of things. She might want something she would say "Where is it"? and you would say "Do you mean this,"—"that,"—you might mention fifty or sixty things and she would say
135 "No" No, isn't it too funny I can't tell," and you might happen to strike the thing, at least she would seem satisfied, she would say, "Yes, that's what I mean," and appear satisfied,—and you might not happen to. She might give it up or you might give it up. I was very often unable to guess what she meant. When we first went there she seemed to think it was her duty to entertain

us and she would try to tell us long stories, but she couldn't and so after a while, after we had been there a few days, she would sit silent all day long, every once in a while she would say some little thing.

Q. While you were there did your grandmother utter any intelligible sentence alone which you could understand? A. She would say "What is it,"—"Who is it,"—nothing more than that. I was there with my mother in November, went down November 6th, 1906, I think we were there three nights at this time. I saw my grandmother then. Miss Fague joined in the conversation, she talked all the time, she was very talkative,—let me see, that was when I was there over my birthday and they tried to get Grandma to have her pictures taken, and when they found out it was my birthday they said it was just the time for her to go and have them taken for me. So we had to coax and coax and coax and at last we got her to go, to have her picture taken, it was some photographic studio on the corner of Pennsylvania Avenue and *J* Street I don't remember the name. She went with us,—we walked there, she went with my mother and Miss Fague and Mrs. and Miss Love and I. She said it was silly to have her picture taken, she said
136 "You are so silly." She tried to tell me a story one day about a nurse she had had after her first attack and she wasn't very much pleased with this nurse—I don't remember her words, the only part of the story I remember in her own words was at the end, she was very much provoked at something the nurse had done, they had gone out for a walk, when they came back to the room she said, "Now, I am a lady, now you go,"—she was very much provoked with her, that's all I remember in her own words of the story. In telling the story she did not talk in ordinary smooth language. Miss Fague had told us the story several times before; she told it in her own way. I think every little while, Miss Fague would tell us, "She means this," or "She means that,"—we couldn't have understood it else. Miss Fague had heard it several times before. I couldn't have understood if she hadn't been there to interpret, yes, I couldn't have understood it. I very often talked with Grandmother alone, I was not able to understand what she said then. I couldn't understand, I would have to ask her over and over and over, I would imagine I knew what she meant. I was there for two weeks in April, 1907, at this visit in April, 1907 she looked older and weaker, she had failed a great deal, we thought. she was not able to talk any better, there were some days she would talk better than others, probably on account of her physical condition. She would say the word "blossom" "spirit," "mercy" "Holy Ghost" or "La Fetra," always something from the Bible excepting "La Fetra." She would say "Where is the spirit," or it may be any of those other words, she might mean one of us or she might
137 mean some thing. Why, she never uttered a sentence without using one of those words since her attack. I have heard her use profane or indecent words, I think I have heard that a great many times, perhaps at all my visits there. Before her attack she did not commonly use such words she was very careful and did not

very often use them after her attack. Referring to April 1907, Mrs. La Fetra was very often in the room, she came up always every day for a little visit and Hettie was there all the time, we talked a great deal, Hetty was jolly and very talkative, Grandma didn't talk much. Every time we made her a visit we tried to coax her to come home to Brooklyn with us, she would say that she would wait until she could talk better.

Q. Well, now, I want to get her words,—did she say it that way? A. She would say "He says it will come",—I can't think of her exact words,—I think that she meant the doctor thought it would come all right, her speech would come back in the end. I can't give her exact words. I say that is what I think she meant. At this visit in April, 1907, I very often sat down and talked with her and tried to convey something to her, I tried to tell her of things. I would try to tell her of lots of things, I can't think exactly how I would try to tell her. When I told her things she never understood me right away. I would say it over and over and over and perhaps she wouldn't know then. When I was talking to her I sometimes thought she understood what I said, understood the meaning of what I said. I did not see her after that visit of April, 1907, until after she was brought home dead. I didn't see her in Washington after that.

138 Q. I ask you whether at any time during the period from September, 1905, to the time of her death, she uttered an intelligible sentence without the assistance of any one else.

Question objected to as leading.

A. Nothing longer than "Who is it", or "What is it". She never called me by name, not after her attack. She always called me by name before that; the only person she called by name was Mrs. La Fetra, she would say "Mrs. La Fetra", that's the only name she could say, and she tried to say Hettie's name but she never got any closer than "Ettie", she would say "That girl over there" pointing to the couch where Hettie used to sleep, "Where is she; that girl over there", —but she couldn't say her name. Sometimes if she would want to know where some of them were, if Clara was out of the room she would say "Where is your husband",—"Where is your wife", she said that to me or to my sister if she wanted to know where the other one was. My sister was not married, I would say "Do you mean Clara"? she would say yes, or no. That way of talking commenced with Mrs. Magaw after her attack and continued until the last time I saw her. Well, I did attempt to read to my grandmother one day, she used to be fond of having the newspaper read to her, so I picked it up one day. I started in to read but I found she couldn't understand anything, she didn't appear interested so I gave it up. Well, at first she would say, "What is it", or "Who is it",—she couldn't understand, she usually grew tired. Miss Fague read to her, she used to read the Bible mornings and they had several little devo-

139 tional books that they read. Miss Fague said she didn't think Grandma understood anything she said. This was during one of the visits, I don't remember which. I think she said it more than once. I cannot place the time any closer. It might have been at any or each of these visits in 1906 and 1907. We were

there at Hettie's birthday, Grandma had given her Five Dollars, she said she thought it was very nice of her,—Grandma. She never mentioned her business to us. Miss Fague always said she would like to have a house to live in when she grew old, she was saving up money to buy a house. That might have been said in the presence of Mrs. Magaw, it probably was, because Grandma was generally in the room, she didn't take part in the conversation or show any interest — it. Grandma didn't call Miss Fague by any name, when she wanted her she would say, "Where is she, where is that girl". During my visit in April, 1907 Grandmother appeared to be much feebler than she had been before.

Q. In your opinion, what was her capacity for attending to her business affairs? A. I don't see how she could do anything, how she could attend to her business at all, she couldn't make herself understood, she couldn't make known what she wanted to express.

Question and answer objected to, this witness not having shown sufficient knowledge of the condition of Mrs. Magaw to give an opinion touching her capacity.

During the visit of April, 1907, to which I have referred there was no way of telling that Grandma knew who I was. I saw her every day during that two weeks. We spent all the time we were
140 in the hotel in her room. At that time she was able to take care of herself. She had a nurse, Miss Fague. Miss Fague remained with her night and day, she had her couch in the same room at night, she couldn't even dress herself, she tried several times when she didn't come up from breakfast in time but she couldn't get her clothes on right. At that visit I did not see her read any, she never took up a paper or a book, she couldn't see, she couldn't even see with a strong magnifying glass. I did not see her try to. Miss Fague said Grandmother could not see to read.

Q. I show you "Complainant's Exhibit No. 2 for identification" of May 22nd, 1908, and ask whether you ever saw that letter before (handing witness paper)? A. Yes, I have seen it before. I am familiar with Grandmother's handwriting, we corresponded regularly. I know whether that is in her handwriting or not; it is her writing, it isn't the sort of a letter she used to write, she was a very well educated woman, her letters were very interesting and entertaining,—that is the way she used to talk. I have some letters written before her attack but I can't remember how close to it they were. They were written before, I have several.

Q. I ask you to read this "Complainant's Exhibit No. 2 for identification" of May 22nd, 1908, and say whether or not it reads as Mrs. Magaw talked during your visit of April, 1907? A. It reads very much as she talked.

141 Cross-examination by Mr. LEIGHTON:

I spoke of three visits that I made to Grandmother after her attack in 1905, that's all I have referred to. One of those visits, the middle one, I spoke of a birthday, that was in November, 1906. I have no objection to stating how old I was then, I was twenty-one,

that was the time that Grandmother went out and had her picture taken for me. I know who made up the party, that went out with her, yes, my mother, and Mrs. and Miss Love, Miss Fague and Grandma and I. Mrs. and Miss Love had the room next to Grandma's, they were simply friends of hers. We went about three blocks, Grandmother walked there and back. After we had had the pictures taken we all took a trip to Great Falls, she went with us to Great Falls, by the trolley car, it takes about an hour and a quarter to get there, took the trolley car out, we had lunch there and I imagine we got back about three in the afternoon.

Q. Was that the only time during this visit or either of the other two visits that your grandmother went out with you? A. I believe she went out driving with me several times. Yes, we would coax her but she wouldn't go; we couldn't get her out. I am not positive whether she went out driving in April, 1907, during my visit there at that time, she may have. I remained in the hotel at each of these three visits the La Fetra Hotel, all of the time. I had conversations myself with Grandmother every day. Sometimes she used indecent expressions once or twice during the conversation with me. She has
142 used those expressions in conversation with me. She had used those expressions in conversations with me and I have heard her with Hettie and other people.

Q. That was when she was endeavoring to say something and failed in selecting the right word to express what she desired to express, wasn't it, it arose in that way? A. Not necessarily.

Q. Wasn't it a manisfestation of irritation on her part? A. She seemed to be irritated, or she may have said it in fun, laughing. Before her attack she was not accustomed to use indecent expressions laughing, in fun, no indeed. After the attack I have heard her do it in that way several times in the presence of people other than myself. In the presence of Miss Fague. I think Miss Lewis has been there. Hettie would say, "oh, you are naughty now" and Grandma would laugh. She did not know—appreciate what Miss Hettie told her, her reproof about it. I don't know why she would laugh but she laughed after Hettie would speak to her, called her attention to it. She might laugh and say, "oh, you are too funny".

Q. You say that she seemed to understand when you would help her out, you thought the subject of your conversation was appreciated, didn't you, when you would help her out? A. She might have some faint inkling, it might be very hazy, she wouldn't know entirely everything I would say,—at least I thought she might know. I thought from the way she acted she might know.

Q. What was said that led you to believe she knew what you were talking about or she was talking about, the subject of the
143 conversation. A. If I would mention a certain thing and she had asked for something and I would say,—"Is it this or that",—I might mention a certain thing and she would say yes and sit back in her chair and seem satisfied.

Q. And if she wasn't satisfied she showed a dissatisfaction and kept on until she was satisfied and got the right thing? A. No, not always.

Q. Sometimes she would be dissatisfied and give it up, would she, not trying to make herself understood? A. She would sit back in her chair and say "No, no, too funny, it is too funny, can't tell." I have opened the door and seen Miss Fangue reading in the morning but I would always go away and wait until they were finished. I never was there while she was conducting the reading exercises in the morning. I would leave them quite alone.

Q. Do you know whether Hettie was in the habit of reading after this attack to your grandmother, in the newspapers, or anything but religious books? A. She read the Bible,—no, she didn't read the newspaper latterly because she said Grandma didn't understand anything she said and she didn't want to hurt her eyes reading. Referring to the subjects of conversation between myself and Grandmother when we were together during these visits, she might say "How are they,"—I wouldn't know who she meant, I would mention a great many people, perhaps I would say "Do you mean Rob,"—my cousin,—and she might say, "Yes,"—"Are they
144 well?".—she would say "Yes,"—I would say "He is well,"—I can't think of anything special. And on such occasions I would mention the names of different members of the family to see if she meant such a one. Sometimes she would say that she did and other times she didn't. Sometimes after I thought we had selected the right one, she had said yes, she would talk awhile, then she would say, "No, that's not what I meant, no." I say I always urged her to come home with us. Every time that we went there we tried to coax her to come home with us, early in the summer just before her usual visit, very often she did come home with us and I did this prior to her being taken sick in 1905 as well as afterwards. Her last visit she went home with us after our visit there. Sometimes she would say, "Well, I will see, I will see," but she never in fact came, she said she would like to come, she would like very much to come,—that's the way we understood it in her own way after her attack. Prior to that she never indicated any purpose to come and live with my father or any member of my family for all of the time she said it didn't agree with her in Brooklyn. That's the reason she gave for not desiring to come and live with my father, because it didn't agree with her, she said she would like to make it her home there. She didn't indicate any purpose to come not to live with us at all times, if she stayed any later than the latter part of August she would get this terrible cough and it would take half of the winter for it to wear off, she couldn't stay with us. Miss Fague was a very good nurse, she was impetuous, sometimes she would become provoked, things Grandma would say, we would say, "You know Grandma doesn't mean it, she doesn't know what
145 she is saying." She would say, "That is so," but she attended her faithfully during all the time of Grandmother's illness, from the time she was employed until Grandmother's death. This conversation about Miss Fague saving money for a house must have come up, by her volunteering the information to me. I wouldn't speak of it first. I don't know why she said it, it was done in the

presence of Grandmother. I don't remember whether Grandmother showed that she heard it or paid any attention to it.

Q. Apparently, did Miss Fague speak in that way so your Grandmother might hear it? A. I didn't think about it at the time.

Q. Did you afterwards? A. No, I didn't, she may have, I don't know. Mrs. La Fetra was very kind to Grandmother, during all the time she was there, she made a great deal of Grandma, she used to come in and say how much she loved her, she used to come in and say how much she thought of us, she liked us. Grandmother thought a great deal of Mrs. La Fetra, she would pretend so, Mrs. La Fetra would love her and kiss her and Grandma would say, "Oh, you are so silly," Grandmother would say that. Grandmother said I was "Silly" when I wanted her to have her picture taken.

Redirect examination.

By Mr. McDivitt:

I have a record of three visits that I made to Grandmother from September, 1905 to the time of her death. I was there in March and November, 1906 and in April, of 1907. She looked weaker and older each time I saw her,—feebler. I never heard Grand-
146 mother say that she wanted to do something for Hettie, referring to Miss Fague. I never heard Mrs. La Fetra or Miss Fague say that Grandmother said that.

Recross-examination.

By Mr. Leighton:

I suppose this controversy has been spoken of quite often in my family, we discussed it last night, myself and father and mother went over what I was going to say.

Charles E. Banes, a witness of lawful age, was called for and on behalf of the complainant and testifies as follows:

Direct examination.

By Mr. McDivitt:

My name is Charles E. Banes. I reside in Washington. My business is real estate. I was acquainted with Mrs. Alice D. Magaw in her lifetime. During her residence at the La Fetra Hotel in Washington, I was her agent for her property she had here. I knew her, I guess 12 or 15 years. I was agent for her all that time. I can't give the exact date here, but I judge that my agency continued to within a year of her death.

Q. When you saw her last what was her condition?

Mr. Leighton: I object to that question, for her condition at that time is too remote to have any bearing upon the question at issue here, and further the witness is not a physician and is not, therefore qualified to testify.

Q. When you saw her last at the Hotel within a year of her death, what was her mental condition? A. She was out of her mind.

Mr. LEIGHTON: I object to that answer, as the witness is
147 not competent to testify in any way as to her mind, except as associated with the facts.

She didn't say much, because she couldn't connect her words in talking to me. She commenced to talk about her Heavenly Father in Heaven, and I didn't stay there any longer than I could help.

Q. Did you see her more than once within a few months of her death?

Mr. LEIGHTON: The witness has not testified that he saw her within a few months from her death, and the question is, therefore, leading.

A. I saw her twice, the second time I went there I simply called in to see how she was—how she was getting along. I just told you she couldn't talk very well, couldn't connect her words. I don't remember what I tried to talk about. She didn't seem to understand, and I didn't stay but probably five minutes.

Q. How did you come to give up her affairs? A. I got word one day in my office that somebody wanted to see me at La Fetra's Hotel, that Mrs. La Fetra wanted to see me. I went down there, walked into the hall, some lady came up to me, and I asked for Mrs. La Fetra. She said, "I am Mrs. La Fetra." I asked "Do you want to see me." She said "Yes, I want to see you about Mrs. Magaw's property up on B Street. It is vacant and in bad condition." I said, "I don't consider the house in bad condition, because I was in the house three or four days before and looked over it." I was around there every day, as I was building $156,000 worth of prop-
148 erty in the same block and I dropped in to look at Mrs. Magaw's house. Mrs. La Fetra said, "You have too much business to look into it" and I said, "I don't think I have because I took the trouble to go in and look at it." About two or three days afterwards I received a note to turn the property over to Mr. Forrest, but I couldn't do that unless I had some authority. I consulted Mr. Williamson, and he told me to get an order from Mrs. Magaw's son, and I told Mr. Forrest that, and he wrote up the order and got it signed, and then I turned the property over to Mr. Forrest, not to Mrs. Magaw personally.

Q. Did Mrs. La Fetra say, or did she not say, at that interview anything about your giving up the affairs?

Mr. LEIGHTON: I object to the question as leading.

A. She said that I had too much business to attend to the property.

Q. Was her manner pleasant? A. Kind of bossy—kind of ordering people around. I don't think that I saw Mrs. Magaw more than three or four times within the last two years of her life. She usually went away in the summer-time to Brooklyn, and I had no occasion to see her about anything, except to send her a check every month and a statement. She came in to see me two or three times. The last time I went there I simply stopped in to see how she was, but generally I went there to transact business.

Q. What in your opinion was her capacity to transact business generally within the last year of her life?

Mr. LEIGHTON: I object to the question, because the wit-
149 ness has not shown any knowledge of her condition or testified to any state of facts which entitles him to state her condition in his opinion.

A. I don't think she was competent to attend to business—the last time I saw her especially.

Cross-examination.

By Mr. LEIGHTON:

My memory is that I saw Mrs. Magaw not more than three or four times during the last period of her life. I don't include those times she came to the office. I mean I think I went to the La Fetra Hotel three or four times within the period of one year prior to her death. Once I saw her at Mrs. Williams' when she lived on Capitol Hill. I went to see her three or four times within the last two years. The last time I saw her was before I was discharged as her agent. I never saw her after I discontinued collecting the rents. I do not remember the exact date that I discontinued the agency, but could easily tell if I was at the office. I think it was within a year. I never saw her after that day. I don't remember that I did. I couldn't tell when was the last time before that, that I saw her. Whenever I went to see her, it was on matters of business connected wtih her property. Except once or twice when I just stopped in to see how she was. When she came back from Brooklyn I usually stopped to see her, in a social way. The last time I had any conversation with her was just before—well, it was within three or four months of the time she died—In the La Fetra Hotel in the parlor, I think there were
150 two or three ladies in the parlor. I sent up for her and she came down. I tried to talk with her there. I don't remember what was the subject of our conversation. I tried to talk in a general way about her health. She couldn't talk business at all. I can't tell just exactly what I said. I saw her about five minutes. I may have seen Mrs. La Fetra at this time but I didn't know her if she was there when I was talking with Mrs. Magaw. This was before I stopped collecting the rents. I can't tell just how long before. I might have seen her two or three times within a year, but I don't know when it was. I don't recollect any other conversation I tried to have with her at the time before this I have mentioned. The last time I saw her she was not very well. I was simply collecting rents. That was all the business. I simply sent her a statement and check every month until I was discharged as agent. Mrs. Magaw was a woman of strong character when she was in good health. A woman of intelligence, capable of managing affairs and knowing what she wanted to do, disposed to do it and have her own way when she had made up her mind. Naturally a woman of force. Mrs. La Fetra seemed to have a whole lot to say about my discharge as agent and I thought she was responsible for my discharge. It didn't make much difference to me. I could stand the loss of that business. I never

heard tell of the Magaw boys. I saw a gentleman by the name of Magaw after Mrs. Magaw died. He came into my office, but before that I had never seen any of them. Originally Mrs. Magaw herself came up there and brought the papers from some real estate man on F Street years ago. I also sold some property to the
151 Terminal Company here for her. I can't tell just when—when they were buying up property there. Quite a long time before her death. I was then her agent. After I ceased to collect her rents, I had no further business relations with her.

Mrs. ANNA LOVE a witness of lawful age, was called for and on behalf of the complainant, and testified as follows:

By Mr. MCDIVITT:

My name is Mrs. Anna Love. I reside now at the Brunswick, in Washington, on I Street, near 14th. I formerly lived at the La Fetra Hotel. I was acquainted with Mrs. Alice D. Magaw in her lifetime. I lived at the hotel three or more years, while Mrs. Magaw lived there. We left the hotel on the 1st of May 1907. I gave up my rooms at that time. During the last year or two that I was at the hotel I saw Mrs. Magaw sometimes once a day and sometimes more. Almost every day, except one time when I was sick. I was away from the hotel about a month. From the 1st of January, 1907 until I left the hotel, Mrs. Magaw was in very feeble health. Dr. Custis told me it was a clot of blood on the brain.

Mr. LEIGHTON: The answer is objected to as hearsay, and I shall move to strike it out.

During this time in 1907, we couldn't carry on a very lengthy conversation with her. She was not in condition to talk much. Toward the latter part of our visits Miss Fague would say, "These are
152 your best friends" when my daughter and myself would go in there. She didn't seem to know us at first, but afterwards recognized us. She liked company very well, and was pleased to have any one call. She tried to talk when I was there. I cannot describe how she tried to talk. During the time she was sick she never used the right words when she was talking, or very rarely used them, when she wanted to express herself. I was out of the city when she was first taken sick in August 1905—I first saw her after she was taken sick, in September 1905. From that time until the time I left the hotel, Mrs. Magaw's condition did not improve. She was more feeble, was very, very feeble. Sometimes she would use the word "Promise". She would say, "My promise, my promise". I suppose she meant her mind. She also used the word "Kingdom". During my talks with her sometimes I think she understood what I said, I am not sure, but sometimes she seemed to understand, but still I am not sure. I was with her alone very frequently.

Q. At those times without any suggestion from you, she was able to utter complete sentences?

Mr. LEIGHTON: I object to the question as leading and suggestive.

A. No. I cannot tell more in detail how she would talk and act. She talked at random at times. Sometimes she would try to talk,

but she couldn't use the correct words. She was not able to read. Her eye-sight was very poor. Her hearing was pretty good. She was not able to take care of herself or dress herself. Miss Fague said she was helpless. Nothing was said about her understanding when she was read to. I read the newspaper to her once or
153 twice, I think. The last time that I read to her she said she didn't understand it, or made me believe she didn't understand it. She shook her head and put her hand out as though she didn't understand it. That was about two months before I left the hotel. After I left the hotel I saw her about three times—on the last day of July. We left the city on the first of August. I remember the fact that she executed a deed. I remember the occasion of hearing about it.

Q. What was Mrs. Magaw's condition then as compared with her condition a few months before? A. Well, I thought she was in a very feeble state.

Q. Mentally, as well as physically?

Mr. LEIGHTON: The question is objected to as leading.

A. Yes. I remember when she executed the codicil to her will—the occasion of it. I was present at the time. I do not know who was present only what I heard afterward. I had some conversation about it with Mrs. La Fetra. She came to our room and wanted us to be—my daughter and myself to be witnesses to the codicil. Mrs. La Fetra wanted us to be witnesses to the codicil and I refused. I told her I thought it would make trouble, and I thought I would not do it. I thought it would make trouble because I know of a case similar to that, where it delayed the settlement of the estate for five years. I mean trouble for the Magaw family. At that time Mrs. Magaw was in a very feeble state I thought. In my opinion, at that time she was not capable mentally of transacting business or of making a valid will. I saw her in the evening of that day. She was in her room. I observed nothing unusual. She tried to talk
154 as usual. I didn't understand anything that she said. She did not speak of the codicil, nothing was said of that. She had previously spoken to me about Miss Fague but I can't remember. She used to talk of Miss Fague occasionally. I can't remember exactly what it was. Before Mrs. Magaw signed the codicil I heard that she was going to sign a codicil or make a new will. I heard it from Miss Lewis.

Q. What did Miss Lewis say about it?

Mr. LEIGHTON: I object, as it is not important what Miss Lewis said. She is not a defendant here, and what she said is not relevant.

A. Well, she said that they were going to have a codicil made to Mrs. Magaw's will.

Q. For what purpose?

Mr. LEIGHTON: I object to that as hearsay.

Q. Can't you remember, Mrs. Love? A. I don't believe I can very well.

Q. Did you say anything to Miss Lewis at this time about the codicil, or making of the codicil?

Mr. LEIGHTON: Same objection.

A. I didn't think it was right.
Q. What did you say to Miss Lewis?

Mr. LEIGHTON: Same objection.

A. That was all.
Q. That you didn't think it was right? A. That I didn't think it was right.

Mr. LEIGHTON: Same objection.

Q. Did you tell her why? A. Well, she knew why, that the old lady was not in condition to have her will tampered with.
155 When Mrs. La Fetra asked me to be a witness to the codicil, I told her why I did not care to be a witness. I told her I thought it would make trouble. I don't remember that there was anything else said. Mrs. La Fetra replied that she couldn't help it if it did. I told Mrs. La Fetra why I thought it would make trouble. I told her I had known of a case something similar, and it delayed the settlement for years. Some of the heirs wanted the whole of the estate, and it was delayed on that account. There was a lawsuit over it. The case I spoke of was similar to Mrs. Magaw's case in that it delayed the settlement. That's all. I have no other meaning. It just delayed the settlement because some contested the will. They didn't want the will to stand—some of the heirs. I have heard Mrs. Magaw refer to flowers or plants standing in her window. She would say the "angels" sometimes the "promise" and sometimes the "kingdom". At these times she pointed indicating what she referred to. She indicated the plants frequently during the last year of her life she referred to the plants in that way. Mrs. Magaw generally sat in her chair during the last six months of her life when I was talking with her. She sat still so far as I remember. She moved her hands and feet in a natural way. There didn't seem to me to be anything unnatural. She took hold of her dress just so. (Witness indicates by clutching or pulling her dress up with her fingers.) She did that frequently, several times, I guess, while I was in the room, within half an hour, say. That was before I left the hotel.

Q. Did she have any other motions or movements of her
156 body or her eyes, or her hands. A. No. With reference to the general expression of her face, well, until she was stricken she was a very intelligent old lady. After that she sometimes would have a vacant look. At the time the codicil was signed, on that day I didn't see her at the time the codicil was signed, but I saw her later, and she seemed to be composed. In May after I left the hotel it was very warm and she complained of the heat. She seemed to be suffering from the heat when I called. I have known Mrs. La Fetra pretty nearly eight years, I think. Not quite eight years. I think she is a bright smart woman. As far as I know she was very kind to Mrs. Magaw. Mrs. Magaw liked her very much apparently. Mrs. La Fetra was always a busy woman, I should think she was a woman of strong, positive character. Her son, was at the head of the hotel. I presume Mrs. La Fetra had something to do with the

hotel, but I am not positive. I believe Mrs. La Fetra was always in good health while I was there. Sometimes she would have little spells.

Cross-examination.

By Mr. LEIGHTON:

When I and my daughter, or any of her friends, came into the room where Mrs. Magaw was, she seemed to be pleased. It didn't matter whether it was myself and daughter or strangers that would call. She was always pleased to have company. Her face would brighten up. In her attempts at speech sometimes she appeared to be conscious that she had made a mistake in not speaking
157 the right word. At those times she manifested impatience at not being able to catch the word that she wanted. For instance when she would point to the flower plants on the window-sill and miscall them, she would laugh over it. I don't know whether she laughed at her mistake, but she would laugh. Sometimes her mistakes in miscalling things would lead her to an irritable condition, and sometimes she would laugh ; I spoke of reading to her, I read to her only very small paragraphs in the paper once or twice, and she would tell me or point that she couldn't understand it. I inferred that she didn't understand it. It might have been that she did not desire the reading continued. I know she made a gesture.

Q. You don't know whether she didn't understand, or that she may have desired the reading discontinued? A. It might have. I went away in May of the year she died and I saw her but three or four times afterwards. I came to the hotel for the purpose of seeing her. The last time I saw her I think she was worse than she had been. It was July 31, 1907. I did not attempt any conversation with her at that time, very little. Miss Fague and my daughter were present besides myself. I can't remember whether what she said about Miss Fague was complimentary or otherwise. A few times I think she didn't like the way she acted, that she was out too much. Miss Fague was in attendance upon her night and day. She had no other nurse during the months of her last illness. Before she had this stroke, Mrs. Magaw talked to me of her property and busi-
ness affairs. She said that she had made a will. She said
158 she owned three small houses. But I don't think she spoke to me about her property or business affairs after that time. I did not know she made a deed to the property. All I knew was in respect to the codicil. I declined to witness that because I thought she was too feeble to be worried and I was afraid it might lead to a lawsuit, and for that reason I declined, that was the only reason. I said I spoke to Dr. George Custis, the old gentleman. I never met his son. Dr. George Custis never discussed with me the condition of his patient, only that she was very feeble. He never discussed with me her mental condition in any way. Mrs. Magaw took her meals in her own room. They were brought to her. I can't say whether she fed herself or was fed. I have been in her room when she has been taking her meals, and I saw her feed herself, but at

other times they have prepared her food for her. Miss Fague did it and I saw Mrs. La Fetra prepare the food for her. After it was prepared Mrs. Magaw took it herself. She did not go out much during the last year of her life. Whether she did at all I don't remember. When I called to see her she was sitting up usually. I don't think she could write her own name. In my room she tried to write her name, but couldn't. She was attempting to write her name on a small slip of paper. She made me understand she wanted to pay something. I don't know what it was. It was just a piece off the margin of the newspaper. She was in my room, that was about a year before she died. She used to come to my room very often. I do not know whether she was accustomed to sign her own checks in settlement of her bills. I do not know whether Mrs. Ma-
159 gaw was accustomed to associate with the people in the hotel, in the parlor, during the last year of her life. I don't think she went down stairs. I am not able to state positively about that. She used occasionally to come down to Mrs. La Fetra's room in the evening, but how long she did that before she died I don't know. Never mingled with the people in the parlor at all, so far as I know.

Redirect examination.

By Mr. McDIVITT:

Q. Coming back to the time when the codicil was made, you said you told Mrs. La Fetra you thought that she was too feeble to be worried at that time. What did you refer to at that time regarding Mrs. Magaw?

Mr. LEIGHTON: I object to the question as not being proper redirect examination, and the witness' answer stands for itself.

A. I thought she was in such poor health and so feeble that she ought not to be worried, and that's all.

Q. What was her mental condition?

Mr. LEIGHTON: The witness has not shown herself competent to testify to her mental condition, and I object to the question on that ground.

A. I didn't think she was in a fit condition either mentallly or physically.

Q. To do what? A. To have this codicil drawn up.

160 Recross-examination.

By Mr. LEIGHTON:

I never before knew anyone afflicted with aphasia, loss of words or the right use of words. Never had any experience with that kind of disease. I don't know whether it involves the mental faculties or not.

Miss BELLE LOVE, a witness of lawful age, was called for and on behalf of the complainant, and testified as follows:

Direct examination.

By Mr. McDIVITT:

My name is Belle Love. I reside now at the Brunswick Apartment House in Washington, with my mother, the last witness who testified here. I was acquainted with Mrs. Alice D. Magaw in her lifetime. I lived at the La Fetra Hotel at the same time Mrs. Magaw lived there. Myself and my mother and Mrs. Magaw lived at the hotel at the same time, about seven or eight years, except when we left for the summer vacation. We were very well acquainted. I remember the time when Mrs. Magaw was taken ill. We were out of the city at the time. I saw her next after she was taken sick, the latter part of August, I believe, or the first of September, 1905. She was very feeble at that time. She was sitting up. I talked with her at that time, she was able to talk then. I could scarcely understand what she said. At first I couldn't catch the meaning. It would take me some time to tell what she meant. It was not because something was the trouble with my hearing, my hearing is very acute.
161 She used the wrong words to express herself. She didn't use the proper words in the proper place. She would use the words "promise" or "mercy" or a great many other words that I can't recall at present. I cannot give any illustration of how she used them.

Q. Were her sentences at that time intelligible or clear in meaning?

Mr. LEIGHTON: The question is objected to as leading.

A. No.

I saw Mrs. Magaw frequently during the last two years of her life. We changed our residence from the hotel in May, 1907. We left on the 1st of May and we saw Mrs. Magaw the last week in July. We left the city for the summer on the first day of August and we saw Mrs. Magaw I think the last week in July. During the last year I was at the hotel I saw Mrs. Magaw two or three times a day. She sometimes came to our room. Her condition, mentally and physically, as regards her strength or feebleness during that year before I left the hotel was very feeble. She was failing constantly; she couldn't walk with as firm a step as formerly, and she was not able to go to the dining room as she had been before, and her meals were served in her room. There was a change in her look, her appearance. She lost flesh; that is, her face showed that she was losing flesh. There was not anything in her looks which indicated a loss of intelligence. There are no other ways that I can describe her failing condition. She was not able to talk any differently at any time from the time of her stroke until her death. That condition which affected her speech continued the same; as a
162 matter of fact it grew worse. I cannot give any of her gestures in connection with any words or attempt to talk. I have read to her, she would ask me to read more. She would not

use those words, she couldn't express herself, but I was so accustomed to being with Mrs. Magaw that I understood her very well without her even expressing herself. At times she understood the reading; she seemed to be pleased with the reading. She did not make any remarks about the subject of the reading, never did that.

Q. You say at times she would understand. Were there or were there not, times she would not understand the reading?

Mr. LEIGHTON: The question is suggestive and leading, and is objected to for that reason.

A. Yes, there were times when she didn't understand it. She would fall asleep. I remember the occasion of Mrs. Magaw's signing a codicil to her will. Mrs. La Fetra spoke to me about it before it was signed. I was in my room at the time; it was room No. 38 La Fetra Hotel on the same floor with Mrs. Magaw's. My mother had 40 and I had 38 and I was in my room when Mrs. La Fetra spoke to me. She told me Mrs. Magaw would like me to be a witness to a paper, and she told me what the paper was, and I told her I would not sign a paper unless I knew the contents; she told me the contents partly; she said that Mrs. Magaw wished to leave something to Miss Fague. I said that we knew the Magaw family, and we knew Mrs. Magaw, and that we could not be a party to anything like that, and that we couldn't sign a paper of that kind. I said there would be trouble. That is all. I saw Mrs. Magaw in the evening of that day.

163 Q. What was her mental and physical condition at that time?

Mr. LEIGHTON: I object to that question, as the witness is not competent to speak of her mental condition.

A. Just the same as usual.

Q. And what would you say that was, as regards her mental and physical condition? A. Well, she couldn't express herself properly.

Q. In your opinion would you say that she was capable of transacting business at that time?

Mr. LEIGHTON: I object to the question as the witness has not shown herself qualified to give an opinion.

A. I do not consider that she was capable of adding a codicil to her will or making a will.

Q. Was she, in your opinion capable mentally of safely transacting business?

Mr. LEIGHTON: Same objection, and also the question is outrageously leading.

A. No.

I don't believe we saw her in May, 1907. I saw her in the last week in July. Her condition mentally and physically was different at that time, in July, 1907, from what it was the time her codicil was signed in February. She was very much worse. She was failing very rapidly then. As far as I know, Mrs. La Fetra was very kind to Mrs. Magaw. I know Mrs. La Fetra very well. Mrs.

Magaw never talked to me about her will or codicil. Before her stroke in 1905 occasionally she would talk to me about her property. She never spoke to me about her property after that.

164 Cross-examination:

By Mr. LEIGHTON:

I never read to Mrs. Magaw after I left the hotel in May. Prior to that time I frequently read to her, quite frequently, not daily; perhaps once a week and perhaps twice a week. That habit did not continue up to the time I left the hotel. It was discontinued when Miss Fague took charge of Mrs. Magaw. When Miss Fague was out I occasionally read to her. I would read to her, or she would indicate by a motion of the hand to a book lying there she would like me to read to her. To one accustomed to her modes of expression she could not always understand her the same as the speech of a child. I could generally understand what she wished to say. I read from the Bible and newspapers. She was not interested, up to the last time I read to her, in the general news of the day, she was losing interest in them. She did not retain interest in the general news of the day the last time I saw her, or up to the time I left the hotel. I can't recall the last time I read to her from the newspapers. I don't know how long it was before I left the hotel. My reading was confined exclusively to the Bible, newspapers and magazines. I didn't read continuous novels or books of that kind. Miss Fague was in the habit of reading to her the same as I after she came there, and from the general newspapers and the Bible the same as I. Sometimes I was there when she was reading. Mrs. Magaw did not appear to me to be conscious of the fact that she had misspoken a word, or miscalled a word, or had not said what she desired to say. I knew
165 what she meant to say, or what she desired to express because I had been with her so much that I was acquainted with her habits and her tastes. When she had miscalled a word she very rarely manifested any impatience at the fact that she had misused a word, but occasionally she did. She indicated her wishes or desires by motions or signs, as well as by speech. I don't remember the last time she was at my room before I left the hotel. She was in the habit of coming there quite frequently, I can't remember when was the last time. Mrs. Magaw was in the habit of receiving company up to the time I left the hotel. She seemed to enjoy her friends visiting her. In her way engaged in her conversation with them, that is, manifested her interest, and this continued up to the time I left the hotel. She was in this habit of going to her meals down stairs at the common table until within a month of our leaving the hotel. She went to the common table and ate her food the same as anybody else up to that period. She was not in the habit of mingling with the guests at the hotel in the parlor, and in the social life, up to that time. She didn't enjoy going to the parlor very much. She didn't when she was well. She didn't before this illness in 1905, she would always say to me that she preferred to stay in her own room. She was a woman of considerable intelligence and a great reader, conversant with the general

affairs of the day and interested in public matters. She was not a woman that discussed with people generally her private business matters. Never said anything to me about her will or about mak-
166 ing a deed. The first I heard about this codicil was from Miss Bertie Lewis, who had charge of Mrs. Magaw while Miss Fague was in the hospital. I am not very intimate with Miss Lewis. Miss Lewis did not state that Mrs. Magaw desired to make a codicil nor that Mrs. Magaw wanted to give something to Miss Fague. She didn't say that she had found the old will. At the time the codicil was made, Miss Fague was not in the house. I heard that she was at the hospital. I know she was not in the house. I should say she was out of the house a week or two before the codicil was made. I have been a witness to a will. I thought it was necessary for the witnesses to know the contents of the will before they became a witness. I thought that was their duty and I thought Mrs. Magaw was in too feeble a condition to add a codicil and to make a will at that time. I thought it would lead to litigation. I didn't think it was right. I didn't know that she did desire to make it herself; I never heard her express herself to that effect, I never talked to her about it. I would not have thought it wrong if she had desired to do so. I took it from what the doctor told me that she didn't know what she was doing. That was Dr. George Custis. I couldn't give the date when he talked with me, I can't recall how long before the making of this codicil. My opinion was based upon what Dr. Custis told me. Dr. Custis didn't tell me that in his judgment, Mrs. Magaw was capable of making a valid deed, contract or will, but if he had told me that, I would have had some hesitancy to sign as a witness, I wouldn't agree to it. I never have had any experience with anyone afflicted with
167 aphasia. This was my first experience, so I don't know whether it affects one's mental faculties or not, only what Dr. Custis told me. He told me he was treating Mrs. Magaw for a clot of blood on the brain, and I took it for granted that a person in that condition was not capable of adding a codicil to a will, and my attitude in respect to the will was based upon this statement of Dr. Custis. I reasoned from what he said that the party must be disqualified from making a will. I do not know whether Miss Fague knew whether this codicil was being made or not. I thought the provision made for Miss Fague was such as would likely provoke a contest of the will. I thought Mrs. Magaw had no business to make a devise of property to her—not when Mrs. Magaw was in that feeble condition. Miss Fague, during my stay in the house, was with Mrs. Magaw night and day as her nurse. I think she was faithful and kind to Mrs. Magaw. Mrs. Magaw would become very impatient at Miss Fague for leaving her at times when she thought Miss Fague should be there with her. When Miss Fague went out to take exercise she would become impatient at her absence. How long before the codicil was signed was it that I had this conversation with Miss Lewis? The day the codicil was signed Miss Lewis told me that she didn't want to sign any paper, or be witness to that codicil, she told me that she was to be a witness, she said she had been asked and that she had declined. That did not influence me at all. Miss Lewis was in my room. We were all three in

my room Miss Lewis, my mother and myself, when Mrs. La Fetra came in. Miss Lewis did not state that, in the presence of Mrs. La Fetra, but before Mrs. La Fetra came in. She knew that she
168 would be asked, or rather, intimated that she would. I don't know whether Miss Lewis had anything to do with getting up the codicil. I do not know whether she was directed by Mrs. Magaw to find her old will. I don't remember that she told me that.

Redirect examination.

By Mr. McDivitt:

Q. You say that your opinion of Mrs. Magaw's mental capacity at this time was because of Dr. Custis' statement. I ask you whether your opinion of Mrs. Magaw was based wholly upon the doctor's statement, or whether you formed an opinion of your own from your observation of Mrs. Magaw?

Mr. Leighton: I object to that as leading and suggestive.

A. Not altogether on Dr. Custis' statement. I had formed an opinion of my own.

Q. From your observation of her?

Mr. Leighton: I object to that and shall move to strike it out at the proper time.

A. From my observation of her.

Q. And your opinion of Mrs. Magaw you have already stated? A. Yes.

Dr. Oscar H. Coumbe, was called as a witness by and on behalf of the complainant and testified as follows:

Direct examination.

By Mr. McDivitt:

My full name is Oscar H. Coumbe. I reside at 248 Delaware Avenue, when I am in Washington. I am now residing in the
169 country, at Fairfax, Va. I am a physician. I have been practicing about 17 years in Washington. I examined Mrs. Alice D. Magaw in her lifetime, at the La Fetra Hotel in Washington, about December, 1905. I made the examination at the request of Mrs. La Fetra. I was attending Mrs. Love and Miss Belle Love——

Mr. Leighton (interrupting): I want to object to any evidence from this witness touching the condition of Mrs. Magaw at this time, as it is too remote from the subject of inquiry to throw any light upon her condition at the time she made the deed in controversy.

Witness (continuing): Mrs. La Fetra brought Mrs. Magaw into Mrs. Love's room, saying "Doctor, you have done so much for Mrs. Love and her daughter, and we are tired of Dr. Custis, and we are satisfied he is not doing Mrs. Magaw any good. He has promised to cure her by a process of absorption, which he has not done." And she told Mrs. Magaw to sit down. She set her down and

arranged her clothing, and backed out of the room, and left her in the room with Mrs. Love, Miss Belle Love and myself. I found Mrs. Magaw in a condition of what might be termed senile degeneration of the brain and softening of the brain. Her blood vessels were atheromatus. Her heart and pulse beat slow, about 60 to the minute. In trying to talk to the old lady I could not get her to connect more than about three words at a time, and even that was very incoherent and unintelligible, frequently interrupting it with such words as "spirit" "kingdom", "mercy" and a word she used very frequently, "trouble". And after questioning
170 her, or trying to question her, I believed that she meant Dr. Custis as "trouble." She said that he had been there and that made me think so, and I asked her if she meant Dr. Custis, and she said "Yes, yes". One of her eyes had a cataract upon it. I do not think she saw a particle out of that. The other one was poor and bad. There was a decided drawing on one part of her face. Her condition was very childlike. She seemed to be easy to follow one's directions. Some things she appeared to understand and some things she did not appear to understand, and didn't seem to grasp them at all.

Q. What would you say as regards her appearance? A. Why, she would frequently, if you did not try to keep her entertained—her eyes would drift away to vacancy and go into a vacant stare at one corner of the room, but at no object. When you would touch her or speak to her, or attract her attention, she would look at you, but the look was very unintelligent, showing a woman of very rapidly degenerating mind.

Q. Did you notice anything in regard to her limbs, arms, or hands? A. Decidedly. A condition of paralysis along one side, showing she had suffered a stroke of paralysis at some previous date.

Q. Are there any other physical facts which you found at this particular examination? A. She would sometimes miscall things. She spoke particularly of a chair there one day. In speaking of the chair why she miscalled it. I forget exactly what it was. She very frequently miscalled things. She shook her head and
171 sometimes realized that she had miscalled it, and shook her head showing she had made a mistake. Other times she would pass over it not noticing at all that she had made a mistake.

Q. From this examination did you, or did you not, notice any movement of the hands or fingers? A. She would always move the side that was not affected by the paralysis more frequently than the other side, and sometimes hold the affected hand. (Witness indicates how Mrs. Magaw held one hand by the other.) I saw Mrs. Magaw after this examination a number of times in Mrs. Love's room and in the hall with an attendant or a nurse. I do not know that I can say the positive time, but frequently after that as I attended Mrs. Love and Miss Belle Love at various intervals all the time they were at the La Fetra House, and since they have left the La Fetra House. I do not know exactly when they left the La Fetra House. I attended them down to the time they left the

La Fetra House. After my examination her condition was gradually worse, because previous to that time I had seen her without an attendant, and after that she was always with an attendant in the hall, or else in Mrs. Love's room when the nurse would go away. Often she would be left with Mrs. Love and Miss Belle Love while the nurse went away and took relief or exercise. Mrs. Magaw frequently became dissatisfied with her nurse and other nurses were hired, three or four in all. There was nothing else that I have not stated, only she was weaker, more childlike and always in the care of some attendant.

Q. Did you observe anything regarding her conversation
172 at any of these subsequent times?

Mr. LEIGHTON: The question is objected to as leading, and I shall certainly call the attention of the court to this line of the examination, which has been all through the taking of the testimony.

A. I think I have already stated that she never put more than three words connectively together, and even then very unintelligible.

Q. From your whole observation of Mrs. Magaw at all these times, what would you say as to her capacity for attending to business affairs? A. Why, it was absolutely certain that she could not attend to any business at all, didn't attend to any business.

Cross-examination.

By Mr. LEIGHTON:

I graduated from the National University 17 years ago, Washington, D. C. I am a regular practitioner of medicine. I practice the regular teachings of medicine taught by the regular school. It is not homeopathic, neither is it allopathic, and neither is it electric I don't know what is the peculiar feature of the regular school and its practice which distinguishes it from the allopathic, homeopathic, or the electric but I have been told that a homeopathic tries to overcome troubles by giving medicine that produces them. Whether that be true I do not know. I don't know anything about the homeopathic system. Dr. Custis is said to be of that school, and I knew that at the time I was called by Mrs. La Fetra to see
173 Mrs. Magaw. I did not advise Dr. Custis that I was going to make an examination of his patient. I want you to understand me. I didn't know Dr. Custis was attending her at the time. until after I made the examination. I didn't inquire of Mrs. La Fetra who was Mrs. Magaw's physician. I knew that there was some physician in attendance upon Mrs. Magaw regularly and I didn't inquire who it was. If I may explain to you the manner in which Mrs. Magaw was brought to me was so unprofessional, and I saw in the face of the woman I was requested to examine a condition such that I did not, in the capacity of a physician, examine the woman with any view of making a charge to Mrs. Magaw or Mrs. La Fetra, and I did not do it in that professional capacity that I would have done, had I been regularly called to see a patient, and neither did

I prescribe for her in any way, telling her, and leaving the advice with Mrs. Love, that Dr. Custis was her attending physician, and he being a homeopath I could not consult with him; neither would I be so ungentlemanly as to attempt to advise in this case, he being the physician attending her. I did not prescribe. I applied the test of sensation in order to determine what was the trouble with Mrs. Magaw. I asked her to close her eyes, and would catch hold of either hand. I found there was more sensation in one hand than there was in the other. Also could see in her face that it was drawn from one side to the other, which you will notice in any person suffering from an attack of paralysis or apoplexy. There is no difference between paralysis and apoplexy. It was paralysis of a portion of the brain. There was one portion which seemed to
174 be better than the other. It seemed to be a blood clot. Now I am not positive as to whether it was the right or left side. It produced such a slight impression on my mind, and it has been so long ago, that I do not remember. From my examination it seemed to be a blood clot produced by a rupture of a blood vessel in the brain, due to a degenerated condition of blood vessel to the brain or in the brain; this blood clot producing an irritation in the part of the brain governing motion, that is, speech and sight, more or less. I did not apply any test other than what I have mentioned, to ascertain her condition; that was all I did at that time or at any time. That was all the test I made outside of a general observation. I am not able to state which side of the mouth was drawn, I do not remember. A clot on the brain is liable to produce sudden death, if it is large enough. Very seldom does a blood clot caused by a rupture of a blood vessel in the brain become absorbed to any marked degree. Now if there is an embolism, produced by a blood clot coming off from the heart, it might produce a similar condition. which might become partially absorbed, and the symptoms would become less and the paralysis become less. It would not pass entirely but somewhat. Now that is if a blood clot comes off from the heart and goes up there and lodges. I said a ruptured blood vessel in the brain was what afflicted Mrs. Magaw. I am sure the blood vessel in the brain itself was ruptured because embolism occurs in younger people, and these blood clots in the brain occur in people of old age, and where there is this atheromatous condition of the blood
175 vessel which I have spoken of. I think it was a ruptured blood vessel because of her age and deteriorating blood vessels, the atheromatous condition of the blood vessels, which accompany and go along with a person of her age. It is not her age that made it, but it is the condition of the blood vessel.

Q. At what age on the average do the arteries commence to harden? A. Well, it depends as to whether there is some cause producing that hardening or not.

Q. Well, on the average. You say aged people have it almost universally, now at what age do the arteries commence to harden? A. The age at which the arteries commence to harden depends a good deal upon what physical condition the people have been in in previous life; how they have taken care of themselves; whether they

have taken care of themselves or not. These conditions may be either idiopathic or traumatic. A younger person may have fallen down and produced a rupture in the brain or in the head. Mrs. Magaw's was blood clot in the brain; I do not think that in her condition it could be absorbed so that she could get better because it never was known for a blood clot to become absorbed in a woman or a man of that age, caused by the condition that I speak of. I have three similar cases under observation at the present time. One is a gentleman 84 years of age. It involves the mental faculties necessarily but not always in the same degree. This man that I just spoke of has been of a homicidal and suicidal tendency.
176 It depends upon the stage of the disease as to whether or not the faculties are so involved as to prevent doing business. When I saw Mrs. Magaw at this examination she was sometimes conscious that she misused words and had selected the wrong words, and sometimes she was not. I spoke in my testimony that she spoke of a chair and called it some other name, which I have forgotten, because I say I did not pay much attention to it at the time. But several things and at different times. Sometimes she would recognize she had made the mistake and other times pass it by without recognizing it. The fact that she made mistakes in the selection of words showed of itself that her mental faculties were involved. That is a symptom of a person having suffered an attack of apoplexy, and that symptom is called aphasia. Aphasia is permanent when connected with apoplexy resulting from a rupture of a blood vessel in the brain. I have never known a party that was afflicted with aphasia to recover from it entirely. It is a progressive disease. Always gets worse. All authorities say that. I don't remember any books just now. If you keep that open I will give you the authority for it. I haven't especially qualified myself to testify in this case by looking into the books on the subject of aphasia. I haven't seen a book for over a month. I came in from Fairfax this morning. Complainant's attorneys knew that I knew Mrs. Magaw, through Mrs. Love; Mrs. Love having told Mrs. Magaw's son, I believe, of Mrs. La Fetra requesting me to make this examination of her. This was the only examination I made during Mrs. Magaw's life. I do not know the names of Mrs. Magaw's nurses. I
177 have heard them but paid no attention to them. I happened to see her with a new person and I would ask Mrs. Love and she would say that is a new nurse. The other nurse has gone away. My information was derived through Mrs. Love and Miss Belle Love.

If persons have aphasia as a result of a blood clot on the brain they certainly are mentally disqualified from attending to their business affairs and making a deed or a will—I know she did not understand the nature of the business in hand from the time I made the examination of her because she was so obscure and incoherent in her speech and in her manner and in her action. At one time she got up, started out of the room and attempted to walk through a communicating door that she never went through in her life. I haven't seen persons of perfectly normal condition do that same thing—not very

frequently. I don't know that I have. That thing of itself might not be a mark of deterioration but coupled with other things, it is.

I don't recollect the last time I saw Mrs. Magaw, I spoke to her in the hall and a number of times in Mrs. Love's room. No conversation of any length. No, sir, I am not paid for coming here and don't expect to be paid. I have never been told that I would be paid.

Redirect examination.

By Mr. McDivitt:

At any time after my examination of Mrs. Magaw I did not try to converse with her; I simply said, "How do you do", or "How do you feel", or something like that. She would nod and say,
178 "How to do" and sometimes her words would break and become unintelligible. Other times they would be more distinct.

Aphasia is not distinct from paralysis. Aphasia is a symptom of paralysis, or aphasia may be associated with an embolism going to the brain, and that aphasia might become better as that blood clot, which is an embolism, becomes more or less absorbed, but where there is a blood clot in the brain produced by a ruptured blood vessel, and aphasia associated with it, it is not going to get better, but will get worse. Aphasia is not a disease, but only a symptom of what occurs in the brain. The aphasia which affected Mrs. Magaw was the kind of aphasia which I have now described. The indications that showed that she knew she used the wrong word were that she would laugh and shake her head, and sometimes others would call the word that would fit the place, and she would indicate it by a nod.

Thereupon Mrs. Mary H. Williams, was called as a witness by and on behalf of the complainant, and testified as follows:

Direct examination.

By Mr. McDivitt:

My full name is Mrs. Mary H. Williams. I reside now at 1348 Irving Street, Washington, D. C. I was acquainted with Mrs. Alice D. Magaw in her lifetime. I had known her for about 20
179 years previous to her death, about that long. She lived with my mother-in-law, Mrs. Alfred Williams, at 232 North Capitol Street. She lived there at the time I was married to Mr. Williams. I saw her occasionally when I went there, and she was always very pleasant. I knew her at the La Fetra Hotel. I went to see her occasionally. From August, 1905, until the time of her death I saw her no more than once or twice. I saw her in 1905 and 1906. The first time I saw her she seemed to be quite well, after she had had a spell of sickness, I thought. I talked with her. I wasn't able to understand what she wanted to say, hardly, she mostly used words that I did not think were connected with my speech, or about the family, or anything like that. She didn't say very much at all, but she used a couple of words,—"Blossoms" and "earthway". She used two words which I don't think were connected with any of the conversation at all. At this interview she did not make any remark

which was intelligible to me—nothing that I could understand. I saw her last before her death about five months before she died. I think it was in March, 1907. Her condition then as compared with her condition formerly was that she was very weak indeed. I didn't think she was as able to talk or to express herself at that time. I tried to talk with her. I talked to her just like I generally did, and laughed about different things, and she said very little at the last time I saw her. I went again and they had taken her out riding, and I didn't see her then. I do not know whether she recognized me. There was nobody there but herself at that time. I saw her alone. I was only there about five minutes the last time I saw her.

180 I was in one day to see her. I suppose it must have been about three weeks before that time, probably. She was not by herself then. She seemed a good deal weaker the last time.

Q. Well, from the time she was taken sick in August, 1905, until you saw her last, was she able to talk to you intelligently? A. Yes, a couple of years ago she was.

Q. Before what? A. Before this last sickness when I last saw her.

Q. How about in March, 1905? A. Yes, I think she knew me when I went in to see her.

Q. From your knowledge and observation of Mrs. Magaw, what would you say as to her mental capacity to attend to any business affairs in March, 1907, when you saw her?

Mr. LEIGHTON: The question is objected to as the witness has not shown sufficient acquaintance with Mrs. Magaw to entitle her to give an opinion.

A. Well, I don't know about that at all. I don't think she could attend to very much; she looked so weak.

Cross-examination.

By Mr. LEIGHTON:

I was there in March, 1907—the last time I saw her, I only stopped a few moments. I went to the house purposely to see her. There was no one present while I was there. Mrs. Magaw's eye-sight was not good. All along for a good many years I do not think Mrs. Magaw's eye-sight has been very good. I couldn't tell whether she recognized

181 me or not. I can't positively say that from August, 1905, I saw her but this one other time that I have mentioned. I did go in as often as I could to see her when I came down the street to the stores. When I saw her the next time before this she was in company with some one. The lady who took care of her was in her room. She had some person there. One was away at the time and they had another but Miss Fague was back again. I think Miss Fague was there. At this time I had some conversation with her—this second time that I speak of I did most of the talking. She appeared to enjoy my visit very much. She responded to it as well as she could and asked me to come again. I had known her for a good many years. I do not recollect what the subjects of my conversation were. I don't know how long this was after August 1905. I was just in to see her a few times between August, 1905, and this instance I speak of, at which I saw her, and she always seemed to enjoy my

visits. I just stayed a few minutes. She appeared very much gratified. She did not so express herself to me, she didn't say anything. Glad to see me, she said. At the time that I saw her she appeared to be conscious of miscalling words in her conversation. She would often say I can't say what I would like. She was conscious of the fact that when she attempted to speak she had miscalled a word. I think she knew what she wanted to say, but was not able to say it. The last time I saw her she didn't seem to know how to express herself. She seemed to be conscious of what she desired to say, but was not able to select words with which to say it and that condition existed up to the last time I saw her.

182 Redirect examination.

By Mr. McDivitt:

Q. On your cross examination you said that she seemed to know what she wanted to say, although she was unable to express it. I ask you what indications can you describe showing that she did know what she wanted to say?

A. Well, she—I don't know exactly how it was. She only said two or three things. Then she said these two or three peculiar words and mixed the conversation up.

Q. What was it that made you think she knew what she intended to say, but was not able to say it?

A. I don't think she did the last time at all.

Q. You don't think at that time that she knew what she wanted to say?

A. No.

Recross-examination.

By Mr. Leighton:

A great many times she said, "I can't say what I want". I presume she was conscious of making mistakes in the words she wanted to say.

Mr. McDivitt: I offer in evidence the certified copy of the paper writings purporting to be the last will and testament and codicil of Alice D. Magaw, deceased, and ask the Examiner to mark it "Complainant's Exhibit No. 59."

(Note.—The Examiner marks the same as requested).

Mr. McDivitt: I offer in evidence certified copy from the Office of the Recorder of Deeds for the District of Columbia of a deed made by Alice D. Magaw to Amelia E. Huntley, Lydia H. Tilton
183 and Hettie H. Fague, dated May 28, 1907, and recorded the same day in Liber 3076, at folio 215 et seq. of the Land Records of the District of Columbia. I ask the Examiner to mark the same "Complainant's Exhibit No. 60".

(Note.—The Examiner marks the same as requested.)

BESSIE E. HURT, was called as a witness on behalf of the complainant and testified upon oath, as follows:

Direct examination.

By Mr. MCDIVITT:

I live at the Portner Apartments, 15th and U Streets, N. W., Washington, D. C. I was acquainted with Mrs. Alice D. Magaw. I met her in her room at the La Fetra Hotel, at 11th and G Streets, in Washington. I had a husband who was very sick there at that time; he was sick in bed with tubercular trouble and while I was there nursing him, I met Miss Fague, who was Mrs. Magaw's nurse, and while I was there I met Mrs. Magaw. I came here to nurse Mr. Hurt about the 25th of March, 1907, I think; I don't know the exact date. I remained there about ten days. In my conversations with Miss Fague, Mrs. Magaw was mentioned frequently. Miss Fague spoke of her patient as being a lovely old lady, and said she was a great care to her and she could not leave her for any length of time. She didn't say very much about her on account of Mr. Hurt being in the room, except that she was nervous and weak. I saw Miss Fague at other times, once or twice. She mentioned the fact that Mrs. Magaw was very nervous and weak—not very strong and that she needed a great deal of care. I had never been told what she was suffering from, but I thought she had paralysis, and I
184 believe I asked Miss Fague if she had not been paralyzed, and she told me the doctor had pronounced it that. I sometimes saw Mrs. Magaw, I saw her when I went over to the room, just for a minute or two occasionally, she didn't say anything; we all talked around her, and sometimes addressed her and she would say yes or no, but I never heard her say anything further than that. She would try to say something further than that, she tried to talk, but I supposed she could not from her paralysis.

Mr. LEIGHTON: I want to interpose an objection to the character of the questions, they are very leading.

I tried to talk with Mrs. Magaw, I frequently asked her how she was and she could not seem to answer me, and Miss Fague would always talk for her. Mrs. Magaw did not, at any time I saw her, utter any conversation or sentence that I could understand.

Mr. LEIGHTON: I object to the question as leading.

Mrs. Magaw did not say anything about making Miss Fague a beneficiary in her will. Nobody ever suggested it to me.

Q. How would you characterize her general appearance or condition?

Mr. LEIGHTON: The question is objected to as the witness has not said enough about Mrs. Magaw to entitle her to speak in this manner.

A. I should say she was very frail and weak.

185 Q. I just want you to say how you would characterize her generally—her appearance and condition? A. I would characterize it as feebleness and weakness.

Q. What indication was there in your talks with her, or in any conversation in her presence, that she understood what was being said?

Mr. LEIGHTON: I object to the question as leading.

Q. Well, I don't know that she was capable of *making.*

Q. What indications were there, if any that she did understand? A. There were times when I don't think she did understand; she didn't make any expression one way or the other, no change of her face, by which I could see that she understood; sometimes she would nod her head in acknowledgement of what was said.

Q. How would she acknowledge it? A. By a shake of her head.

Mr. LEIGHTON: I object to this as leading.

Q. From all your observations and attempts to talk and converse with Mrs. Magaw, during all of the time that you have known her, what would you say as to her being capable of attending to business affairs?

Mr. LEIGHTON: I object to the question as the witness has not shown any such knowledge of the condition of Mrs. Magaw as would entitle her to give an opinion.

A. I feel that she was not in a condition to attend to busi-
186 ness; I don't think she was strong enough.

Cross-examination.

Mr. LEIGHTON:

I did not say that I saw Mrs. Magraw but twice. I was in her room several times and went driving with her once. That was during the time I stayed in the house. Miss Fague and Mrs. La Fetra were with me when I went driving on this occasion. We took a drive through the parks in the city. Mrs. Magaw was not in a condition so that she could get down to the carriage without assistance. Miss Fague assisted her, with her assistance she got to the carriage. I didn't notice that she experienced any pleasure in getting out. Miss Fague dressed her and told her they were going for a drive. I could not say how many times I saw her when I was there in the hotel. I had cares of my own, and I did not try to remember that. My husband was ill there at that time. I saw her most every day. I cannot tell how many times I went into the room where Mrs. Magaw was while I stayed there. Sometimes I stayed there for twenty minutes at a time, I did that more than once, several times. During the ten days I was there, I always went there when Miss Fague was present. Sometimes Mrs. Magaw would indicate by a nod of her head that she understood what was said to her. Her countenance would brighten up when we were talking in the room. The subject of conversation when this transpired was usually fancy work. Miss Fague always had some needlework on hand at that time, it would be a conversation touching that. Miss Fague and
I would be talking about it and her countenance would
187 lighten up during these conversations. The conversation was sometimes directed to her and she would smile. I cannot

tell how many times this occurred. We were gone upon this ride that I speak of about an hour, we just drove through the town. Mrs. Magaw did not manifest any pleasure that I could see. I sat on the front seat, I observed her, I turned around and talked to them. During the ride Miss Fague would talk to Mrs. Magaw, and she would try to listen to her, and would say yes or no. She was not able to be up and about the house, and could not be about to see to things without assistance. That is not what I mean when I say she was not able to attend to business. I mean she could not talk to you and that is why I think she could not properly attend to business, because she could not talk to me; that was what I thought about it. But what I saw of Miss Fague's treatment of Mrs. Magaw she was kind to her. I have had a good bit of experience in sickness and nursing. Miss Fague was kind and faithful to her during her last sickness.

Redirect examination.

By Mr. McDivitt:

Referring to my statement that Mrs. Magaw with Miss Fague's assistance was able to get from her room to the carriage, she did not walk down the stairs, the elevator took her down. The distance from the elevator to the sidewalk was about the depth of two rooms; about 15 or 20 feet.

Recross-examination.

By Mr. Leighton:

188 I did not always take the elevator myself, on this particular time I did not take it. I was down stairs. She walked from the elevator to the carriage and from the carriage back again when we got home, and from the elevator shaft to her room both times.

By Mr. McDivitt:

In all her walking Miss Fague assisted her. Sometimes she would put her arm around her to support her.

By Mr. Leighton:

I never saw her when Miss Fague did not have hold of her, at all times when she attempted to walk.

By Mr. McDivitt:

Her walk was slow, and she seemed to have some difficulty in one side; she apparently drug her foot. That was what I observed about her. I don't know on which side Miss Fague stood when she would assist her.

Mr. McDivitt: I offer in evidence the certificate of death, which is a transcript of the records from the Health Office of the District of Columbia, dated December 26th, 1907, of the death of Mrs. Magaw. It is marked "Compl't's Ex. No. 1 of Oct. 9, 1908."

I offer in evidence "Compl't's Ex. No. 1 for Identification," offered for identification on May 22, 1908. The exhibit is dated January

17, 1905, being a letter in the hand-writing of Mrs. Magaw. It is marked "Compl't's Ex. No. 2 of Oct. 9, 1908.

Mr. McDivitt: I offer in evidence "Compl't's Ex. No. 2," which was offered for identification on May 22, 1908, being a letter
189 in the hand-writing of Mrs. Magaw. It is marked "Compl't's Ex. No. 3 of Oct. 9, 1908."

Mr. Leighton: I object to the offer of this letter in evidence; it is not signed; it has not been properly identified, and it is not dated.

Van Brunt Magaw, recalled, testified as follows:

Direct examination.

By Mr. McDivitt:

My mother, Alice D. Magaw, at the time of her death, had a relative, a half-brother, besides her children and grand-children. His name was Abram C. Davenport, he died a few days after mother died. He resided at the time of his death at Clifton Place, Brooklyn, N. Y. The relations between Mrs. Magaw and her half-brother were friendly, so far as I knew.

Q. What was his condition, financially?

Mr. Leighton: I object to the question as irrelevant and immaterial.

A. He was very poor, financially.

Q. Was he young or old?

Mr. Leighton: I make the same objection.

A. He was much younger than mother; little older than myself. I am not sure of his age. Up to the time of my mother's
190 first stroke or attack in August, 1905, up to and prior to that time, I should say she was above the average, intellectually. I never knew her mother; she died when she was young, but I knew grandfather very well.

Mr. Leighton: I object to the question and answer as irrelevant and immaterial.

My mother's father was named John T. Davenport, he died just before my father's death, and he died in 1887, or a little before that.

Q. How did your grandfather, Mr. Davenport, die?

Mr. Leighton: I object to the question as irrelevant.

A. With a stroke of paralysis; a very heavy stroke. It was supposed that he starved to death. He lived 5 or 6 days, that was the first stroke as far as I know.

Q. Would you say that prior to Mrs. Magaw's first attack in August, 1905, that she was in fair health, considering her age?

Mr. Leighton: The question is objected to as irrelevant and immaterial.

A. I think she was; she was a very old woman; she was past eighty.

Cross-examination.

By Mr. LEIGHTON:

My grandfather at the time of this paralytic stroke was a pretty old man; I can't give his exact age. I was present at the time of the stroke. I was in the house; I saw him a few minutes afterwards.

He must have been over 80 years of age. Mr. Davenport,
191 her half-brother, visited Mrs. Magaw while she was living here in Washington; he was here just after she had this paralytic stroke. I think he must have been here before, I don't know. I guess he came here to see her, and on other business also. I don't think he had other business, I don't know; I think he came to see her—just after she had that stroke.

CAROLINE F. WOLFLEY was called as a witness for complainant and testified as follows:

Direct examination.

By Mr. MCDIVITT:

I reside at #1005 13th Street, Washington, D. C. I knew Mrs. Alice D. Magaw in her lifetime. I knew her all my life. She was practically one of the family; just the same as a relative, not my own immediate family, but in Mrs. Alfred Williams' family. Mrs. Williams is now dead. She was not the Mrs. Williams who has testified in this action. Mrs. Magaw wasn't any relation at all to Mrs. Williams. Mrs. Magaw and my grandmother were brought up in the same town and they were very dear friends, and when Mrs. Magaw didn't live at Long Island she lived with Mrs. Williams and Mrs. Williams was my father's own cousin. I spent a great deal of my time there and I knew Mrs. Magaw very well. I did not live in the same house with Mrs. Magaw but I stayed there at times—went back and forth. I visited Mrs. Alice D. Magaw when she lived at the La Fetra Hotel in Washington. I remember her when she was taken sick in 1905. I remember seeing Mrs. Magaw during
192 the last two years of her life. I saw her frequently, about once a month at least; sometimes I saw her a couple of times a week in her room in the La Fetra Hotel. I saw her immediately after her first attack. She was in a very miserable condition at that time. The first time I saw her she was attempting to eat. The nurse was in the room—not Miss Fague—and she simply ate in the most animal-like fashion; she was putting the food in her mouth with her fingers, and any one who had known her in her lifetime knew that she was just as fastidious as she could be. But she improved from that, but she always had her food prepared for her, and of course, afterwards she went down to the café to eat, but it wasn't eating of a kind she had ever done before; she had to have all her food prepared and handed to her. She would go to the café alone, that was—well, now wait a second, I don't know that she did go to the café alone after she had that attack. After I would see her in her room, she would usually be sitting up dressed. I usually saw her alone; when

I came in to see her, Miss Fague or Mrs. La Fetra would leave the room.

Q. Will you describe at any of the visits that you made her during the last two years of her life what her actions were and what yours were when you were with her? A. When I would go in the room she never seemed to recognize me; Miss Fague would announce who I was, and she would say "Oh, is it you" in a pleasant voice.

Q. Will you give us the conversation you had with her at any of the visits you made her during the last two years of her life-
193 time? A. Understanding her as I did I tried to make my conversation along the lines that I thought she could best understand; that doesn't sound very good, does it. I can't give any conversation that I had with her. I talked to her at those times, and she tried to talk to me. I don't recall any conversation; I can't recall it. She didn't say anything. She tried to say something, she would try to talk, but I never knew what she was talking about.

Q. Did you observe any sign, or motion, or word, or action of any kind on the part of Mrs. Magaw which indicated that she understood what you said to her at any of these times?

By Mr. LEIGHTON: The question is objected to as leading.

A. No; I don't think I did. I can remember several words or phrases that Mrs. Magaw used in her attempts to talk. She used the terms "spirits," "spirit way," "earthway," "communion," "blossom;" I don't recall any more. Occasionally when entering the room, when she was told who I was she would call me "blossom" and several times when Mrs. La Fetra was leaving the room, she seemed to refer to her as old "earth way," but she used the other terms in general conversation, no matter what she was talking about. After Mrs. Magaw's first attack to which I have referred, she had another attack; I don't know when it was—whether it was a year or six months after the first attack. It was an attack of some kind, illness in bed. It might have been a year or more after her first
194 attack. I saw her once when she was in bed with an attack, during the last two years of her lifetime, the time to which I referred.

Q. At any time, from the time of her first attack in 1905 until her death, were you able to converse with her and understand what she tried to say?

Mr. LEIGHTON: The question is objected to as leading.

A. Well, I always tried to converse with Mrs. Magaw, but I never felt that she understood what I said, and she certainly never conveyed to me what she meant.

Q. From your personal observation of her and your visits to her and your attempts to talk with her, what is your opinion as to her capacity to attend to ordinary business affairs?

Mr. LEIGHTON: The question is objected to as the witness has not shown such qualification and knowledge of Mrs. Magaw that would entitle her to give an opinion as to her mental condition.

A. I thought she was incapacitated to attend to any kind of business during the last two years of her lifetime.

Q. Was there or was there not any substantial improvement in her ability to express herself during tne last two years of her lifetime?

Mr. LEIGHTON: The question is objected to as leading.

A. There was an improvement in her health, but I was never able to understand anything that she said. Knowing her as I did
195 I would anticipate her and try to make pleasing conversation. I talked with Miss Fague about Mrs. Magaw. The topic of our conversation was whether Mrs. Magaw was improving in her power of speech; that was the subject. I can't remember the exact conversation. I don't remember any of the conversations, not even the substance of them or any of Miss Fague's conclusions that I can recall.

Cross-examination.

By Mr. LEIGHTON:

The last time I saw Mrs. Magaw, I saw her the evening before her death. I don't recall the last time before that—it could not have been more than a week. During the last year of her life, I think my visits were as often as once a month. I didn't call as frequently the last year as I had done previous to that time, because she was attended by a nurse and I did not feel that she needed me as much as she did prior to that time; I was in the habit of calling upon her once or twice a week prior to that time. That was before she was taken; after she had an attendant I never thought there was the necessity for my visits that there had been before that. During the period covered by Miss Fague's attendance upon Mrs. Magaw I can't say how often I called upon Mrs. Magaw; after she had an attendant, there was no occasion for me going there as often as I had done, and sometimes I did not go there more than once a month, sometimes probably two or three times a month; I had no regular intervals for calling, I just went there as my leisure was at hand.

Mrs. Fague usually left the room when I was there, so that
196 when I was there no one else was in the room. Mrs. Magaw and I were alone in the room; when I came in the room they usually went out. My visits varied; at times I would go there and spend a time at the dinner hour; sometimes I would take dinner with her; it might have been from one hour to two hours; sometimes it might have been longer. The conversation while I was there was directed to topics that I thought would interest her. In her attempts to reply when she would miscall a word, I don't think she appeared to know that she had made a mistake in the word she had wanted to use. If you questioned her as to what she meant she would repeat the same word, or other words, and try to explain. She would try to explain what she meant but failed to convey the idea.

Q. Did Miss Fague appear to know what she meant or intended to say in her efforts?

Mr. McDivitt: I object to that question, as to what Miss Fague appeared to know.

Mr. Leighton: Answer the question, please.

Mr. McDivitt: The question calls for the conclusions of the witness herself to tell what Miss Fague appeared to know, and is surely improper.

A. I think Miss Fague like myself tried to anticipate what she was trying to say. If we didn't know what she was trying to say—what she meant to say—we would suggest various things to her, as
trunk, or shawl, and if I didn't call the right article she
197 would not indicate. Well, she must have; she would usually
accept what you gave her. If she wanted a trunk and you gave her a shawl she would not take that. Usually her food was all there before her and she just ate it. She ate anything that was handed her; then if she didn't like it she didn't eat it. I don't remember when was the last time I went to the table with her. I must have seen her eating though a week or so before her death up in her room. I should say she continued to go down to the dining room to take her food to within a couple of months prior to her death. She went to the public dining room, she sat at common table with other people. She always had an attendant with her, Miss Fague or some one else. I said in my direct examination that she would go alone sometimes; that was more than a year and a half before her death. She usually had some one in attendance, but there were intervals when she didn't have a companion. I am not married, I am thirty-one years of age. I am engaged in business. I am a clerk in a government office. I say Mrs. Magaw was not capable of attending to any business; I mean she was neither physically nor mentally capable. She didn't know what she wanted, or what she desired to do. That is my idea.

Q. You think Mrs. Magaw didn't know anything about what property she had, or what she wanted to do with it—that she hadn't intelligence enough for that, or did not know. I don't know how you could tell if she couldn't talk. I don't think Miss Fague appeared to understand any better than myself what she intended to say.

198 Dr. Wilfred M. Barton, being called as a witness on behalf of the complainant and being duly sworn testified as follows:

Direct examination.

By Mr. McDivitt:

I reside at No. 1338 H Street, Northwest, in Washington. I am a physician. I was graduated in medicine from the medical department of Georgetown University in 1892. I spent one year as interne in the Washington Asylum Hospital; two years in the Marine Hospital service, and two years as house physician at the Columbia Hospital for Women and Lying in Asylum and began to practice in January, 1896, in Washington, and have been practicing ever since. My practice at first was general and the first five

years of my practice my hospital practice, might be said to be a general practice of medicine; the last five years I have devoted myself more particularly to diseases of the nervous system. I have a small sanitarium for the purpose of treating cases of that kind, and I have made a specialty of those cases during the past five years in study as well as practice. I am professor of —— in the medical department of Georgetown University. I am a member of the Medical Society of the District of Columbia; I am a member of the Clinical Society of Washington, an association devoted to nervous and mental diseases; I am a member of the Medical Association of the District of Columbia; I am also a member of the London Society. I have been called and examined in cases in court in which my
199 opinion has been asked as an expert regarding mental condition. I have been in several cases of that kind. I believe the most recent case I was attached to was the Brady case tried here in Washington last year; I was an expert for the defense in the trial. I have also been connected with a number of other cases as an expert witness, and among them was the Poling case, and I have also of course, testified in a number of lunacy cases in which the question was the insanity of an individual.

Q. I will ask you to suppose a woman of 81 years of age, exhibiting more than the average intelligence of a woman of her age; suppose that her eye sight was poor, and that her blood vessels were atheromatous; suppose that this woman, under the conditions described, suffers with an attack which renders her partially paralyzed, which paralysis later affected one side of her body; that whatever improvement occurred in the power to move the paralyzed muscles was gradual; that subsequent improvement was more marked in the hand than in the foot; that the partial aphasia which was produced at the time of the attack persisted, and that she did not speak an intelligible sentence during the remainder of her life-time; that immediately after the attack and subsequent thereto up to the time of her death she required the constant attendance of a nurse, night and day; that she became childish and helpless, and could not recognize her own son, daughter-in-law, or grandchildren when they came to see her soon after the attack, nor at any time subsequent thereto up to the time of her death; that she could not understand what was said to her, and gave no intimation that she conceived a sensible thought; that she was unable to convey sensible thoughts to
200 others, and that so far as appeared from her actions she could not comprehend anything read to her out of books and papers, including the Bible; that she continued to talk in an incoherent way, using words without proper or sensible connection, and continued to use words, or some of them as "kingdom," "promise," "service," "blossom," "spirit," "trouble," "Holy Ghost," "apostle," "mercy," "and angels," without sensible connection, and that she used *m*uch expressions as "where is my service" "have you got my promise," and "the Lord in my kingdom;" that she remained unable to call her son, her daughter-in-law or her grandchildren by name, and could not speak their names, or any of their names, even when the name was repeated to her; that she used in-

coherent and senseless phrases, such as "is the kingdom coming," "give me by kingdom;" that she could not utter an intelligible sentence from the time the paralysis occurred, up to her death, which took place two years afterward; that she could not dress herself and required a nurse to attend her day and night; that she had previously been very chaste in her language, but that after the paralysis occurred she sometimes used profane and vulgar words; that she had a childish laugh and vacant look and did not give any indication that she recognized her son, daughter-in-law or grandchildren, whom she had very well known immediately previous to her attack and with whom she was on very friendly and affectionate terms; that she simply stared at them or smiled; that she would often hold her paralyzed hand with the other hand; that she had more sensation in one hand than the other; that her habit was to fumble her dress and to move her fingers in a nervous manner; that her own
201 son, daughter-in-law, and grandchildren could not understand what she tried to say; suppose that four months after the attack there was no sensible improvement, and that she could not connect more than three words at a time and then only incoherently and in an unintelligible manner; that she used words frequently in a senseless way when talking, words such as "spirit," "kingdom," "mercy," and "trouble," and that she had a vacant stare all the time; and that her paralysis existed all this time; suppose that nine months after her first attack she did not recognize a physician who had attended her a year before her attack of paralysis and whom she had known for many years; that her physical condition was weaker at this time; suppose that this woman wrote a letter six months previous to her first attack, showing sensible construction and contents, and that immediately after her attack she could not sign her name and that she gradually recovered a slight power to write, and that some time before her death she wrote a letter in a feeble and irregular and almost unintelligible hand, which does not contain and intelligent thought; and also that sometime after her first attack she would eat her food with her fingers at times, whereas previously she had been very fastidious in her manner of eating; basing your opinion, Doctor, upon the facts supposed, are you able to state with reasonable certainty whether the condition described was the result of any disease? A. Basing my opinion upon the facts contained in the hypothetical question, I should say such a woman was suffering from softening of the brain.
202 Q. I ask you whether you are able to state with reasonable certainty whether the conditions described to you, or supposed in this statement of facts was the result of any disease? A. Yes.

Q. Are you able to state with reasonable certainty what this disease was? A. I repeat my answer and state that I believe such a person was suffering from a softening *a* the brain, due to the disease arteriosclerosis and cereb-al thrombosis.

Q. Will you describe from the standpoint of your knowledge of the disease what it is, in as ordinary words as you can? A. I stated it in the way I did, so that it would be as plain as I could make it; it is a softening of the brain, which is the lay expression of

the term that we perfectly well understand. It is a pathological condition which we term cereb-al softening, which has the same meaning as softening of the brain, and I refer to the cause which is usually at the foundation of that condition which is a process involving a loss of blood in the vessels, and interfering naturally with the circulation in the parts of the brain in which these arteries are supplied, and the term thrombosis simply means an accumulation of matter within the lining of a blood vessel.

Q. What do you say as to whether this disease which you have described affects the normal operation of the brain?

Mr. LEIGHTON: The question is objected to as leading.

203 A. I should say that such a condition as that described would entirely annihilate the normal condition of the brain.

Q. What do you say as to whether dementia is a common or uncommon sequel of the disease described?

Mr. LEIGHTON: That question is decidedly leading and I object to it for that reason.

A. Yes, dementia is a very common sequel of cerebral softening.

Q. What, in your opinion, would be the mental capacity of a woman as described in the supposed statement of facts—in the statement of supposed facts—to manage her affairs—business affairs—properly or safely? A. I should say that a woman in such a condition would be totally incapacitated by reason of the disease in her brain to manage any business affairs in a sane or proper manner.

Cross-examination.

By Mr. LEIGHTON:

—. I suppose your opinion is based entirely upon the assumption that all of the facts supposed are as supposed? A. Yes, I base my opinion upon the facts as stated in the question.

Q. And all of them? A. I based it—well, I would not say that my opinion would be different if one or more unsubstantial

204 facts should be eliminated.

Q. I suppose this question was submitted to you before you went on the stand? A. Yes sir.

Q. Did you get that question up? A. I assisted in the writing out of the question.

Q. You are paid as an expert for your testimony, of course? A. Yes.

Defendant's Testimony.

HETTIE HAGAN FAGUE, one of the defendants was called as a witness, and after having been first duly sworn testified as follows:

By Mr. LEIGHTON:

My full name is Hettie Hagan Fague. My occupation is companion nurse; I have been going out as a companion nurse. I know the parties to this suit. I knew Mrs. Alice D. Magaw in her life-

time, ever since the first year she came to Washington; I do not know what year it was. I had entire charge of her as nurse and companion during the last years of her life, from 1905 until 1907. I was with her night and day during that period until her death, with the exception of four weeks when I was at the hospital. From the 29th of January to—I cannot tell you the exact date of February 1907, but towards the last, Mrs. Magaw was boarding or stopping at that time at the La Fetra Hotel. I did not know anything about
205 her making a codicil to her will until after her death. What I know is that she asked me to clean her desk, to fix it. I put all of her letters together of different kinds business letters and all others; and as I finished, I came across the will. She had it hiding between the flannel of her pad that laid on the desk. I said, "Here is your will." I had read every letter before I put it away. And she says, "Put it away, away; in trunk." My trunk stood in her room at a window near where she sat. So I did that, but I felt uneasy about it, and I said, "Shall I not give it to Van Brunt?" She says, "No." I said, "Shall I give it to Mrs. La Fetra to put in her safe?" She says, "No; to keep there locked." A little while after that Miss Magaw came on here, Mr. Van Brunt Magaw and Edna, and she says, "Did mother have a will; we have often wondered." I says, "Yes, I have it." She was glad to know that there was a will and she told Mr. Van Brunt. Then there was no more said about it. I asked her if I should give it to her, and she said no, to keep it as her mother had said. When I was in the hospital, the keys were sent to Mrs. Magaw and the will was taken from my trunk and given to Mrs. Magaw by Miss Lewis. Miss Bertie Lewis came to me in respect to the will, her name is Katie Alberta; we call her Bertie. She was one of the witnesses to the codicil of the will. I did not know anything else about it until after her death. I did not know she had made a codicil until after her death, but I knew of the deed, in this way, there was a squib in a paper saying Mrs. Magaw had deeded two houses on B Street to the Foreign Missionary Society of the
206 Metropolitan M. E. Church, to endow a memorial to Robert Magaw and Alice D. Magaw. The other I knew nothing of. I only saw that in the paper, that Mrs. Huntley, Mrs. Tilton and I were named as Trustees. Some one in the hotel gave me that piece of paper. I did not want the trusteeship. I immediately called on Mrs. La Fetra. I didn't know anything about what to do as Trustee; I do not know anything about business, so I asked Mrs. La Fetra what it meant and she said that Mrs. Magaw had given two houses to the Foreign Missionary Society. That is all I knew about it. I did not want to be a trustee, but I had no choice. I first knew of this provision for myself in the codicil to the will of Mrs. Magaw on the night my brother-in-law was dying, one week after her death. My sister saw it in the paper. This clearing up that I speak of was done just after New Years, 1907, in that week, I think it was. Mrs. Magaw never talked to me about her will or the contents of her will. There was not any conversation with her touching the execution of this deed, the making of the deed, I never heard her say a word.

Q. Were you with her at the time the deed was executed? A. No, sir; I was in Sibley Hospital.

Q. I mean when the deed was made? A. Oh, the deed—yes sir. I was in the room but not when they wrote it. I was there when they came. I did not know what it was they were doing. She sent me downstairs, I did not know what it was then, but I knew afterwards. She did not have any conversations with me in regard to the making of the deed or the codicil to her will. Mrs. Magaw was not a member of the Methodist Church. She never took her
207 letter from New York. She belonged to the two missionary societies (home and foreign) and to the Ladies' Aid Society of the Metropolitan Methodist Church. Before she was sick she used to be very regular at the meetings and at church, but of course in her latter days she did not go to church. Mrs. Magaw attended to her business matters or affairs. She signed her own checks, for one thing, and she used to send me to the bank to take her money up for her and bring it back to her; and when things came up she would correspond. I know one time, for one thing, she had those houses attended to. It was her doings that they were attended to. The three houses on the hill, that she had in that codicil. The two which are the subject of this litigation, three of them, the third one was the one she had given to me in my lifetime, but the other two were given to the foreign missionary society. She had the other two fixed up. She took the work away from Mr. Banes, and put Mr. Forrest in as agent. I could not say for sure when the change was made, how long before her death. I could not say truthfully what time it was. I think it was December before, but I could not say for sure; it may have been earlier than that. I know there was one other transaction during the period I was with her. It was some money that was sent to her from New York. I did the letter writing, which is the reason why I know that, and she wanted Mr. Magaw to take charge of it. Mr. Van Brunt advised her to invest the money here and she wanted him to take charge of it. I do not know the month when these letters were written, the letter was written to Mrs. Magaw, the check was
208 sent to her. The letter came from Mr. Van Brunt. I do not know who sent the money or check. The letters were all in the letters I gave Mr. Van Brunt. I gave him everything in the desk; they were in his package. They were delivered to him after her death, they were among the papers, her effects, that Mr. Van Brunt took away with him after her death. I do not remember whether it was in May or June, 1907 after I came back from the hospital. The correspondence related to a piece of property that had been sold in New York. $1200. was the amount. It was some property of her husband's. I think it was the last division of that property. I understood from her, and understood from that letter, that it was the last that was sold there—that was the tone of the letter. It was in settlement of her husband's estate. There were papers sent on for her to execute or sign. To my best recollection there were papers sent on at this time for Mrs. Magaw to execute, in connection with this New York transaction. I cannot just say

what the character of it was. I know she received the check afterwards. I do not know how many letters were written by me to Van Brunt with respect to this business transaction, nor how many were received by her. I think it was Mr. Van Brunt's letter, and I think, if I am not mistaken, that there was one of Mr. McDivitt's in regard to the business. I had quite a pile of Mr. McDivitt's letters, so I do not know what it was; they were all together. To my knowledge, the deed closed everything. Mr. Forrest was her agent, he attended to this special business. The only assistance I ever saw given to her was to put her pen in her hand, so that it would write; but
209 after it was placed, she signed. I never saw anyone guide her hand, and I know I never did. That condition of things continued until the last check I ever saw her give. It was not very long prior to her death, I cannot say just how long, she had Mr. Forrest invest this money that was remitted from New York in a mortgage, and she added to it from the bank, three hundred dollars so as to make the loan $1500. I wrote to Mr. McDivitt for her, and I wrote to Mr. Van Brunt for her. She directed, and I wrote the letters. Then she would read it over three or four times before she would let me send it. That was what was done before this money was sent on. I wrote four letters before I got the letter she wanted. As far as I knew she took a great deal of interest in the Missionary Society in the Church. She had two Bible women whom she supported for a good long while, and she used to give a great deal of money to it. I know before her sickness I have seen her very liberal. When collections were taken up she was very liberal, and she did a great deal in that regard. In later years she said she could not do so much, because she was sick and had other expenses. I read to her every morning of her life. I read the Bible, and a little book called "Common Prayers." The first thing after breakfast I would read these to her, and we would converse every day, and we used to sing—we had very pleasant times together. In the evening I would read the paper and some missionary paper; anything that she wanted to read I would read to her. She liked most any part of the papers I read. She wanted to know what was going on. This continued up to her last sick—
I read to her even after Clara came. I mean by her last
210 sickness when she died. I know it was within a week before she died I had this reading with her. I think she understood what I was reading about. Sometimes she would comment on the reading, and sometimes she would just sit there, as though she was praying; that is what I thought of it. She enjoyed those readings. I thought she understood and enjoyed what I was reading, for the simple reason that when we would read things, she would refer to it, and she would take the book up and want me to read it again for her. She would say "Read again." And then often she would sit there and hum over the hymns, and those things I had read to her. This condition continued down to within a week before she died; I do not think it was longer than two weeks. The last year we went out; we used to go car riding, and she suggested which car line to take. We would walk up as far as New York Avenue and 15th Street and take the Chevy Chase car to go out to

Chevy Chase. She would not go in the others. I wanted to get on the G Street car at the door and transfer she would say, "No, walk," and we would walk up there. We went up to see Mrs. McQueen, we went up to see Mrs. Emory, when she was ill, when Mrs. Emory was ill. She went downstairs to her meals up to within—I do not know just how many months it was. If I knew just when Mrs. Emory died I could tell you when was the last time she went out, but I do not remember that date. It was before the execution of this deed. I do not know when Mrs. Emory died. It was before she made that deed, or the codicil, either one. The last time she went
211 out, Mrs. La Fetra took her driving, and they went around the Mall. I do not recollect when that was, I cannot remember dates. She was out while Miss Hurt was at the hotel, I do not know just what date that was. She was out after that. I know she was out after that. The very last day she was out, we went to take a little walk and got as far as the Palais Royal and she wanted me to take her in, and I sat her on a stool; she did not want to go any further. She said she was sick, and I took her home. That was the last time I took her out. It was after I went back from the hospital—I could not tell you the date. It was in May sometime. As far as her participating in the social life at the Hotel is concerned, we used to go down to Mrs. La Fetra's room in the evening, when she was able, a party of us, and she would enjoy it. After she was not able to go downstairs, and she did not want to walk or did not want to ride down in the elevator, they would come up to her room, and we would have music and would talk and would have very social times. She had friends come to eat with her, and she would have little meals in her room.

Q. How long did this continue, the going out and going down to Mrs. La Fetra's room? Do you recollect when was the last time she was there? A. The last time I remember was in January.

Q. Of what year? A. 1907. Before I was hurt.

Q. Do you recollect how long she continued to go to the table either the public table or private table of Mrs. La Fetra? A. The
212 last time I remember of Mrs. Magaw being down in Mrs. La Fetra's room was in June, 1907. From going on the floor she was only confined to her room about a week or ten days. She used to go around on that fourth floor. I know of her participating in religious exercises during the last year of her life. There were several times they had communion for her, quite a number of times. I know the last week or last two weeks before her death, Mr. Bailey gave her communion in her own room, and he explained subjects and she was delighted. She talked about it afterwards and said she had never heard the communion service expressed as it had been. That was the last she took it. It was either a week or two weeks before she died, and she told me she had never heard it expressed in that way before, and when she bade Mr. Bailey good-bye, she said, "Good-bye, until we meet." There was difficulty in her speech, after she was sick she had this difficulty. She used the wrong words, but she always knew when she had used them. She knew it by trying to repeat it over.

Mr. McDivitt: I object to the statement that she always knew when she used them, on the ground that the witness so far as appears is incompetent to know that fact. At times her speech was better and at other times it was worse; but she got so she stopped using those words and used the proper words. She was conscious of the fact that she misused these words or selected the wrong words to express what she wanted to say, because it was often that she would put the right word in afterwards.

Q. Could you tell at all times when you were with her what she desired to say; what she desired to express?

Mr. McDivitt: I object to that on the ground that the wit-
213 ness is incompetent to know whether she did that.

A. At times she did know. I could understand things because I was with her all the time and I studied her. I cannot say that Mrs. Magaw used her fingers in eating and was vulgar in her eating during her last sickness. She used her fingers sometimes on account of her sight. I did not see anything vulgar. The manner of her eating, was different from what it was prior to her illness. She tried to do everything like she used to before she was ever sick; but her sight was not good, and she could not always see. She could eat very daintily, in my opinion. I never heard her use vulgar and profane language. She spoke to me about the members of her family, she was always talking about them. Mostly she talked of Mr. Van Brunt. He was the one she always wanted, and she was always happy when he came, was always delighted to know they were coming, and always wanted them. When the girls would come she did not want them to go home, and she did not want him to go. She never said anything to me in respect to giving me a house or making any provision for me. I was the most surprised person that ever lived, because I thought she did enough for me while I was with her. She was good to me. Her condition improved after I had been there, from what it was when I first went there, and then it went back, but it was ups and downs. She seemed very well with the exception of talking and she could not always get the words she wanted; and then she got worse, you know. She had those ups and downs. As far as I could judge, I would say she was competent to make a valid deed or contract at the time this deed was made, because she was
214 of a very strong mind; and you could not move her if she wanted to do anything. I learned that. She was a grand woman and a good woman too.

Cross-examination.

By Mr. McDivitt:

When I first undertook to be her nurse, came to live with her, Mrs. Magaw was sick. She was sitting up in the bed, and she was better. She told me she was better. At that time she was able to talk without any impediment. I knew that there had been a slight stroke of apoplexy; I understood that she was very weak. Her face drawn just the least bit here (indicating); but it went back in a very little time. There was some difficulty in the use of her muscles when

I first saw her. The right side was the most affected, if either one was, this side (indicating) because she was laying that way in the bed, the right side. I do not remember any difficulty in her speech at this time. I was with her then continuously right along, up to the time of her death except when I was in the hospital. I thought she really needed the attentions that I gave her and I think she did; she could not have done it for herself, she was a very elderly lady. I do not think she was feeble in mind and body, I do not think she was as feeble as all that. In one sense of the word, yes and in another sense, no. I was with her night and day. I massaged her, it was massaging as much as anything else. *I* couple of days after I was with her she was out of bed. She could read some at that time,
she read the Bible and read papers, once in a while she read
215 aloud to me, but she said it hurt her eyes. She had been
treated for her eyes before I went there, she said for cataract. Both eyes were affected; but she could see better with one sight. She got so that she could see out across the street and tell the people and things. The first time I remember when she was worse was some time after I went to her. I always had the habit of washing her face and hands before I went down and let her rinse her mouth, and attended to her that way, before she got up, I always did that every morning. She wanted to do that before she got up, and then I went down to breakfast; and when I came back she wanted to rinse her mouth again, and I gave her the cup, and got the water and all, and as I went to put it on the wash-stand, I heard a slight noise, and I looked at her and her face was drawn. I got my hand under here (indicating); I did not know what the trouble was, as I was not an experienced nurse, you know. I saw her teeth clinched, and I took my hand this way (indicating) and got a spoon in between her teeth and separated them, and then with my finger I pulled something, I do not know what it was, something like a little cord, which I pulled out—and from that time she turned better. I could not drop her to call Mrs. La Fetra, but as soon as I could I knocked on the floor, and then sent for Mrs. La Fetra. I screamed and the elevator boy ran down for her; and Mrs. Magaw looked at us as much as to say, "I am so glad." She did not say anything, because she could not speak. It was some kind of a cord that was choking her.
That day we sent for Mr. Magaw immediately. The hour of
216 the day when I found her in this condition was near nine
o'clock; between half past eight and nine. I had seen her previously that morning, she had been talking to me before I went downstairs. I was downstairs a half hour, by the clock. I do not know when this occurred. Mr. Magaw came that night with his wife. We telegraphed and they came that night. I told them about it that time and we were so surprised to see her so well when Mr. Magaw got in that room. This occurred quite a bit before her death, I cannot tell you the date. It was in 1906, but I could not tell you what date. She remained in bed after this attack two or three days; no longer. During that time she could talk a little. She could say "water." She would just say "water," just like a little baby, saying one or two syllables at a time, but after she got up

and around she commenced to call things,—"spirits," "beautiful," and used those words, but I think she thoroughly knew what she meant. From that time on until sometime prior to her death she used words in a peculiar way. I think that was the last stroke or sickness I remember, up to her death sickness. She did not have any affection of the heart, or stomach trouble, or anything of that kind. She could eat anything she wanted to after this attack. She improved and went out and she went around and sometimes she was better and sometimes worse. She was weak. She would say her knees hurt and her feet hurt her; that is what she complained of. She could always say, "Van Brunt," if she wanted him. The minute anything hurt her she would say, "Van Brunt;" and she would know the girls at times when they would come. For instance—I
217 do not know whether this is what you want—if I would tell her something, and I would tell her lots of things, trying to interest her she would say "beautiful," or "spirits," or "blossom," or "Holy Ghost." I never heard her say "trouble," or "apostle," she would say "spirit" lots. I thought I knew what she meant by the use of those words. Everybody could not understand her, but I could because of my familiarity I could tell what she meant, and I watched her just as a child was watched but she knew what she wanted to say, but some people knew. I loved her dearly. I think she liked me. She always manifested it. I did not attend to her business affairs for her only in writing letters, if that is business. I did write some letters for her. I wrote to you and to Mr. Magaw. I never wrote out her checks for her. Oh, yes, I wrote them but I did not sign them. I do not think I wrote most of them. I know I do not, I wrote the body of the checks on the American Security & Trust Company, Nos. respectively, 146, 152, 161, 169, and 181. Some of the other checks are in the handwriting of Mrs. La Fetra, and others are Ed's I think. Most of them seem to be in the handwriting of Mrs. La Fetra, but one or two look as though they were Ed's, but still I am not familiar enough with his handwriting to say. I am familiar enough with Mrs. La Fetra's handwriting to distinguish it from her son's. I know her writing; this is her writing. (Referring to a check.) The checks now shown me, drawn by Mrs. Magaw on the American Security & Trust Company, and numbered respectively as follows, were in the handwriting of Mrs. La Fetra except Mrs. Magaw's signature—Nos. 163, *163,* 165,
218 166, 134, 168, 172, 174, 175, 176, 177, 127, 125, 123, 126, 128, 132, 135, 136, 140, 138, 141, 142, 143, 144, 145, 147, 149, 148, 151, 153, 155, 154, 156, 160, 159, 158, and also the following marked in lead pencil as Plaintiff's exhibits in this case by the numbers 2, 4, 10, 12, 15 and 24, these checks not having been originally numbered, and bearing no check number. For the checks that I wrote I did the writing of the stubs of Mrs. Magaw's check book for her. Referring to one of Mrs. Magaw's old check books containing the stubs of checks which have been issued, that is my handwriting—January 3, 1907, a check for $30 to Dr. Custis. I did not do the writing generally for the checks that she drew. I did not draw any but those (indicating). The one who wrote the

check put it in the book. I have seen Mrs. La Fetra do that. She wrote the checks, and I would see her put it in the book. I wrote to Mr. Magaw in regard to her business in Brooklyn. I do not know anything about Mrs. La Fetra. I know I wrote to Mr. Magaw and I wrote to you. I wrote a good many letters. I do not think she wrote any letters while I was with her. I saw her try to write a letter once; but she did not send it. She had me write it. She said that it was not good. That letter was written just after that stroke I was telling you about, when I found her in the bed; soon after that. She tore it up, the letter I mean. She would not let me send it. I did not tear it up. The letter I have referred to was thrown out in the trash. I do not know what the letter was about; she had just started it. It was addressed to Mr. Magaw. I do not

remember of her attempting to write any other letters or
219 papers. I know her handwriting. In Mrs. Magaw's desk there was a paper of her husband's giving the family tree, and a few letters. I went over the contents of that desk with her. I knew what was in it at the time of her death because I had fixed them all up; I think about the first part of January I did that. She did not write her own letters because she could not see good enough to write them, that is the only reason I know. For a little while her sight was worse after this second attack I have spoken of, than it was before her first attack. It got better, so that if anyone came in the room she knew who they were and would see them at the corner. She would wave to Mrs. Love and her daughter, over at the Palais Royal corner. She could see that way, but she did not write. It was when she was first taken that I told Mrs. Van Brunt Magaw that I often read to her by the hour and I did not believe she understood a word I read. I did say that when she was first taken; this second attack I mean. At first, the first week, but not after that she understood thoroughly after that. That does not cover it later. At this time when she was so sick and did not understand my reading I tried to read to her simply because she would give me the paper and want it read. I talked with the Doctor at that time about her condition. I always asked the doctor how she was. He said she would get better and would get up. Her trouble was apoplexy I understood. I did not notice that she was paralyzed at all at this second attack.

Q. Do you know what paralysis is? A. You cannot move; cannot move your limbs, cannot move your hand. I noticed
220 that her face was drawn; her face was drawn very much. She was not paralyzed in the hand at all, nor in the foot. After this second stroke she went around the room; she would not go downstairs. For a little while she could not walk as well as she could before. She said it was heavy; it hurt her; it was swollen. I never knew her to drag her right foot. When she walked to go down to her meals I went with her. She would not allow me to assist her. I would start to take hold of her arm to help her, and she would not let me; she would shake my arm off. She would not take my arm to go down the steps to the elevator; and otherwise she would not let me help her, not that I ever remember, when she went down

stairs. From the time of her second stroke in 1906, until her death, she never would allow me to assist her in going from her room to the dining room, or from the elevator down to the street. I would try to catch hold of her arm, and she would let go, and I would not take her. She walked slow. I never noticed that she was dragging her feet. She never had the full strength of her limbs, as much as before the stroke, but she got along in walking. She would not let me hold her arm when walking on the street. I was paid for my attentions to Mrs. Magaw. I gave her my attention because I loved her. The money was not the question. And she liked me. I could not have done any more for her if she had been my mother; if she had been my mother I could not have done more, or loved her more. She certainly did depend upon me for her daily needs and attention. I did not talk to her about her business affairs; I
221 talked to her about her clothes. She had to have clothes, but Mrs. La Fetra did most of the talking about that, and Mrs. La Fetra selected for her. She knew better how to do it than I did. Mrs. Magaw did not want me to do it. She did not think I knew enough about it. At the time I was with Mrs. Magaw I was not a woman of large financial means, I depend- upon what I earned, except as my brothers and sisters were kind enough to help me. I have never thought much about having a house of my own, never expected it. I might have thought if I could earn enough it would be nice to have it. I have not expressed that thought to many people, I may have talked about it. At my father's death I expected to work so as to earn enough to have a home before I got real old. I did do that, I guess, and I may have said something about it. Mrs. Magaw did not know that I was working to save up for a home, so far as I know. I never told her, so far as I remember. I do not know as I ever mentioned it in her room. If I did, I did it just in usual conversation. I never said it to her, I never expected—I don't know whether I did it in usual conversation when anyone happened to be there, I might have done it, but I do not remember it. Mrs. Magaw did not act very differently with different people. She was very quiet if she did not care for a person that came into the room. She did not have very much to say and did not take very much part in the conversation. She was very determined in her manner with everybody. I can give you one instance of her determination. I had a brother-in-law very ill, at death's door almost, and I wanted to go home. I had had a phone message that they did not think he could live. I went
222 up and asked her if I could go, and she said no, she was sick; and I did not go. I did not go home that night because she was not willing for me to go. That is one instance. In her last sickness, not when she was on the bed, but just about a week before she died. She said "Don't go; I am sick"; and I would not have left her for the world. It was my brother-in-law. I could not do anything, anyway, and she wanted me and I stayed of my own will, and because it pleased her. When I was employed to care for Mrs. Magaw I was nursing downstairs, and Mrs. Magaw told me she wanted me, and Mrs. La Fetra came up and she told her she wanted me. Mrs. Magaw knew I was nursing downstairs. I was only a day nurse there. When I first went to her I only stayed with her at night

for a week; the rest of the time I was with her all the time. Mrs. La Fetra paid me for my services, but Mrs. Magaw signed the checks. Mrs. Magaw did not make her checks payable to me for services as nurse, I think it was put in the house bill; the bill for the hotel. Several times it was paid to me in checks, but I gave a receipt for it, or signed a paper that it was paid, and it was put on the bill. All the checks that I ever saw paid I saw her sign; and I saw mighty near all of them. I saw mighty near all of her checks signed for the bills. Sometimes Mrs. La Fetra brought those checks to her to sign and sometimes Ed. It was always read over to her two or three times so that she could understand it, just so she would know all the reason there was for paying money out. Sometimes she repeated the substance of the bill, but not always; sometimes she did and sometimes she did not. After this second stroke some-
223 times she did. One time there was something bought for her, and I know she repeated it. It was bought at Woodward & Lothrop's. It was a dress, some gingham I had bought. She said "My dress", when I read over the word gingham. At first she said "What", when I read the word gingham; and then she said "read it again", and then Mrs. La Fetra read it again, and she said "Gingham". She knew it meant gingham. After the second stroke she was not able to read those bills; that is the reason they were read to her, and for her to understand. Mrs. La Fetra during Mrs. Magaw's sickness treated her with the greatest consideration I have ever known. If she had been her own mother she could not have done more. Mrs. Magaw loved her dearly and depended on her more than she did on me. She depended on Mrs. La Fetra ahead of me. Mrs. Magaw was living at the hotel away from her relatives at this time, during this sickness. Mrs. Magaw talked to me only about the missionaries that she supported, and that she would like to help, but she had been sick. I do not know that I can put it right in her own words, but I can give you the substance of it. I would not like to try to give her words, and maybe give something that she did not say. Her words were "she was sick and had had expenses". She said, "I am sick; have had doctor; medicines, and cannot do as I want." As far as I can give it, those were her very words. She used the words, "I cannot do what I want" but not so very many times. This was at one time when she was feeling much better, a great deal better than she had been. It was after her second attack. I remember a particular occasion when she made such a remark, be-
224 cause I had some missionary pictures, and in one of them it had the Bible women she supported, and that is what brought about the talk, the picture of that woman. I did not tell her about the woman being there. She wanted to know—"My woman. where?" and then I pointed it out. Very often that was her usual way of talking. "My woman, where?" A great deal of the time she would speak that way. I never heard her use the word "Gathway" nor "earthway", if I did I have forgotten it, but I do not think so because the odd words she used seemed to impress me. The most odd words she used were "blossom" "Holy Ghost" "spirits", "pathway"; those are the words she used. She would look up to the stars and say, "path, path". She loved to talk about the stars. I was not

always able to understand what she meant, but most of the time. After her second stroke in trying to understand what she meant it was more or less necessary to ask her over and over whether she meant this or not, but not always, not all of the time. When I went to the hospital she was not that way, she did not use strange words then, she had dropped them. I never heard her use "path-way" or "spirit" after I came back up to her death. From that time on I did not hear her use those strange words, not as far as I can remember. I do not think that it is possible that she might have used these words and I not remember them. I never remember hearing her call Miss Wolfley "blossom", I have always been in the room when Miss Wolfley was there. She may have been there while I was at the hospital, but I will not say that she was. I was very seldom out of her room. I seldom went out of doors, I seldom went out home but when I did Mrs. La Fetra stayed with her.
225 I did not take any regular time to go at all. I did go home about once — month; I would stay about an hour or two hours, sometimes. I would stay to dinner maybe once in a while. I went home to dinner once when Mr. Magaw was there. I think there was one time when Mrs. Magaw signed some of her checks by a mark, just making a cross instead of signing her name; her hearing was good during the time after her second stroke in 1906, as far as ever I knew it.

During her sickness when it was hard for her to express herself, I do not think I used any other method of finding out what she said, besides asking her questions. At those times it was common for myself and others to ask her whether she meant this or not. When I did not understand what she was telling me I do not think I had to ask her more than twice or three times to find out what she meant. In trying to find out what Mrs. Magaw said I never spelled any words to her; she never tried to write indicating what she wanted to say to me, I never asked her to do that, I do not remember ever asking her. Referring to the reading, when they would read about the Bible, she would speak of "John." She would call "John" by name, and she often spoke of the Savior. I do not know that I can just say what she did say, I cannot quote her words, I understood what she meant, I am sure of it. Referring to the time when she suggested about taking a car to go to a certain place; we would go out of the hotel and I would say, "Let us take the G Street car," and she would say, "no, go up," she did not say anything more. I cannot tell you just when she went out and sat down
226 in the Palais Royal store referred to in my testimony; it was just before she had the stroke, which was one time she did it; and then she did it a second time, the last time we went out for a walk. She did that in two different instances. The last time she did it, I think was in May or June, 1907, shortly before her last sickness, she was feeling very badly then until I got back to the house, then I gave her some medicine and she got better. She walked out in the hall later on, but would not go down again. I wanted her to try it over but she would not. Never in my life did I hear her use any profane words; I never heard Mrs. Magaw use what you would call a vulgar word in my life. I used to laugh at

some of her expressions. She would use something like "Oh, pshaw." And I would say, "Oh, don't say that it is ugly." They were not what I would call vulgar or profane words. I would not call any words she used indecent. When she would say this word, "Oh, pshaw," I would say "Oh, pshaw, that is naughty, talk straight." I said talk straight just to get her to say what was the right word. I did not think it was what would be called a naughty word, I only used the term; I did not mean it as a naughty word. I may have used that term, but I did not mean it in that light. Of course they can be taken with different meanings. I did it thinking it amused her. Often she would try to talk, and I did it to get her to laugh. No, indeed, she was too much of a lady. Mrs. Magaw's will was put in my trunk and locked from the time I cleaned her desk. She never asked me for it; she asked once, "Is it there?" and I said "Yes." Just before I was hurt she asked me if I still
227 had it—Mr. Forrest had been there—and I said "Yes." He did not know anything about it, no one but Mrs. Van Brunt Magaw and myself knew. I never told Mrs. La Fetra. She told me not to tell Mrs. La Fetra. When I asked her to let me send it to Van Brunt because I felt uneasy about the responsibility of keeping it—she said, "No, no never." I said, if you want Mrs. La Fetra to put it in her safe I will give it to her, but she says, "No, no, say nothing." She says, "Put it there," and she got up and showed me where she wanted it to be put in my trunk. She showed me that herself. I felt uneasy in doing what Mrs. Magaw told me to do about the Will, because I thought the son had a right to that will, not more right than she had but I thought she was sick and she might die. Suppose she was to die suddenly, and that will would be found in my trunk. Those people might think that I took it. I have heard of too many things like that. That was what made me uneasy. I did not want to have the responsibility of it. I did not have anything else of hers. They were all in the desk. I would have put it in the desk when I cleaned it out, but she did not want it so. I went over the letters in the desk and got them all together. I do not remember any letters in the desk which were not written either by Mrs. Magaw or written to her, they were written to her, and there were a lot of photographs and things, trinkets.

I am a member of the foreign missionary society of the Metropolitan Methodist Church. I have been interested in that society all my life. I am interested in the Home Missionary Society. I think if I had a leaning I would have it to the home. Mrs. Magaw
228 leaned to the foreign, she was ten times as strong on that than me. I used to talk home missions, and tell her the things about it, but she always wanted to know about the foreign missions. Ladies from this society came to see her sometimes, they called on her after her sickness. Friends called on her from the church. I never suggested to her that it would be nice to make some donation to these societies because I did not think that was any of my business except that I was interested in the societies, but I was a nurse to her, and I did not consider it was my affair to do a thing like that, with any one I was taking care of. Mrs. Magaw was not more interested in foreign missions than home missions, because there were

more ladies from the foreign missionary society that called on her, because the ladies that called were members of both the foreign and the home societies. Every one has more or less preference, but way back when she first went to church I remember she was that way, was more interested in foreign missions. Mrs. Magaw sent Miss Lewis to the hospital to see me for my keys. Miss Lewis was nursing Mrs. Magaw for me while I was in the hospital and she sent her out every day. I took Miss Lewis' word for it, Miss Lewis told me so. Miss Lewis came to me and wanted my keys. Mrs. Magaw wanted the will to give to Mr. Forrest, for fear I would never get well. Those were the words she used. I had blood poisoning. I gave the keys of my trunk to Miss Lewis and she brought them back the next day. I never saw the Will after that, I have never seen it; I do not know where it was kept after that; I do not know anything about it after that.

229 Miss Lewis took it and gave it to Mrs. Magaw, and then brought me back my keys. Mrs. Magaw had the will. I do not know anything about what happened to the will after I gave her the keys; I never saw the Will after the day I put it in my trunk; Miss Lewis told me she got it and gave it to Mrs. Magaw. The will was never mentioned to me after I got back from the hospital; I did not go over Mrs. Magaw's papers and letters after I got back from the hospital; I never touched those again. I do not know where the Will was; she told me they were going to give it to Mr. Forrest to put in his safe, Miss Lewis told me that. I do not know whether that was really done or not. When I saw the newspaper statement that I had been appointed a Trustee about some houses, I knew that Mrs. Magaw had three houses there and I had been made a trustee for two only; neither Mrs. Magaw nor anyone else told me what had become of the other, the only thing was when I saw this it worried me because I do not know anything about business, and I spoke to Mrs. La Fetra and asked her what this meant and that I did not know how to be a trustee. She said, "That is all right." I went to her for everything like I would go to my own mother; that is why I went to Mrs. La Fetra, I did not speak to Mrs. Magaw about it; I did not know, I never had any thought about speaking to her, I guess; there was no reason under the sun. She never spoke to me about that deed and I never spoke to her, I had no idea of such a thing. I certainly was surprised that Mrs. Magaw would convey the property to me as a trustee, I never understood it; never mentioned it to Mrs. Magaw; I never thought anything more about it; I never said anything about it; I did not

230 want to be a trustee, because I did not know how; I never in my life talked to Mrs. Magaw about it, I could swear on my oath as to that. I may now think it rather strange that such a thing should occur and that I would never speak to Mrs. Magaw nor think her or express my appreciation for it, but I give you my word I did not then. I do now, since you talk more about it, but I did not then. I never spoke to Mrs. Magaw about it. I did not have any choice in becoming a trustee for the property; I knew I could resign if I wanted to but I felt that if she had done it and wanted me, it was my place to do what she wanted, the same as I would feel if

my father had done it; I would have done it because he wanted me to.

Q. Did you have the same feeling about being a trustee as you did about keeping that Will? A. Well, I do not know as I thought of it in that light. I thought she wanted me to be a trustee, and I thought I ought to be, because she wanted me; I knew because it was in the paper, because I read it, that is all. I suppose it was because I thought that she knew what she was doing, and because she wanted it. This deed of trust referred only to two houses. I did not know what Mrs. Magaw did with the other one, until after her death.

Q. Did you think at the time anything about the circumstance that she only made you a trustee for two houses, when she had three? A. I did not know what she did. I knew she had three, and I thought she was going to give the third to one of the girls.

That was my opinion. She did not say this; she never said
231 a word to me. It did not occur to me that there was anything strange about the fact that this deed which I saw in the paper referred only to two houses instead of to the three. Mrs. Magaw never said she was going to do anything for me at any time. Well, at the time that my keys were brought back Miss Lewis told me that Mrs. Magaw had done something nice for me, but she did not say what, and I said "She ought not to do anything for me, because she has been very good and kind," and I never thought it had anything to do with the Will. I thought maybe she was going to have some friends up there when I got home. It is not a fact that I had some inkling at the time those deeds appeared in the paper, bearing upon those two houses, that Mrs. Magaw had done something for me regarding another house; I never thought that; I am sure that my memory is perfectly good. It did not occur to me that there was anything particular about her making me a trustee for the two houses instead of three, when she owned the three, because I thought maybe she wanted to give the two houses away. That is what I thought of. I did not think what she was going to do with the other; I supposed she might give it to the grand children; she never said to me that she would; she never said to me anything about what she was going to do. She made me some presents; she gave me two dresses while I was with her. She was very kind to me; she thought I needed it, she said; that is what she told me, and I did not have the money to buy it.

I think a person has got to know what she is doing, decidedly, in order to make a Will or sign a contract. If they did not
232 know what they were doing, of course they could not do it. I think she knew what she was doing. When I say that she was so competent during the last year of her life, I mean if she comprehended what she was doing at the time she did it, and I think she comprehended it. I mean she was competent to make a Will or sign a contract if she comprehended the contents of the paper that she signed at the time it was signed. I understand that if a person to whom a paper is presented for signature fails to comprehend the contents of that paper, and its meaning at that time, that he is not competent to execute it at that time. I understand that people are

different at different times; a person is not able to do business when they are asleep. I think she was in condition to sign. You want to know, for instance—say she was able to eat and go around, and all that and you would give her a paper to sign and read it over and over, and she did not understand it. I would not think she was competent. But if you were to read it over to her and she understands it, she is competent. If you assume she did not understand it, I would say she could not do it; but I do not say she did not understand it. If she did not understand what she was signing she was not competent to make a contract or deed.

Redirect examination.

By Mr. LEIGHTON:

I filled in the body of those checks I spoke of, at Mrs. Magaw's request; she was present and requested it.

233 Recross-examination.

By Mr. McDIVITT:

Mrs. Magaw always requested me to fill in those checks when it was done, every single check that I drew; they were written at the date. I never knew when it was impossible for Mrs. Magaw to request those checks to be written; I never knew her not to be able to suggest it. I said at one time she was not able to speak at all; but she had the book; she could get up and get that book. The three checks I wrote to Dr. Custis, she was able to tell me; those are all I think I ever wrote, that you showed me this morning. She says, "Money, Doctor, book." I would go to the desk and get the books, She would say, "Write" then I would write down the amount. The doctor would hand her his bill. She would request him three or four days before to bring it. She would say, "Want money". That is all she would say, and he said one day, "No". She said "Come when want". Those were the words. When he gave her the bill she would say, "Money, doctor". Then I would go to her and I would say, "Well, what do you want; the doctor to write this"? And I would hand her the bank book. She would say "You write it." Then I would write it. She would write her signature. That is substantialy the way it occurred every time I made out a check for her.

Mrs. LYDIA H. TILTON, was called as a witness in behalf of the defendants, and having been first duly sworn, testified as follows:

By Mr. LEIGHTON:

234 My full name is Lydia H. Tilton; I am one of the defendants in this suit. Referring to the heading of complainant's bill of complaint, I know all of the defendants except the last three; the last three I do not know, except as I have seen them at this hearing.

Q. You with the defendants, Huntley and Fague, are charged

in Complainant's bill with procuring the execution and delivery of the deed described in the bill.

A. I know nothing about the execution and delivery of that deed except what I heard. I became advised of its execution after it was executed; I do not know how soon. I cannot tell the number of times I saw Mrs. Magaw; I used to go in when I would be down to Mrs. La Fetra's, or down town, because she was sick and sometimes I would carry her things that I thought she would enjoy. Perhaps it would be two or three times a month that I would be there. I was not there immediately after her stroke. I did not see her at the times that she could not talk. I never saw her when she could not talk with me. My acquaintance with her commenced seven or eight years ago. I cannot tell how frequently I called between 1905 and the time of her death; I should say once or twice a month. I did not begin immediately after her first sickness. I did not go there until I thought she was ready to see friends; I could not say how long before her death. I was there quite a number of times in January and February, 1907; I was there before that a great many times, but I do not remember the dates at all. I was there alone, say, from January, 1907, up to the time of her death, two or three times a month. I went there because she was a sick member of our church, to which I belonged, and because it
235 was one of my duties to call on the sick. I was on the committee to call on the sick. I went there also because I had met the woman and was interested in her, and I thought it would be a pleasure to her to see me. Pardon me, if I ask one question. You ask me what I knew about the making of the codicil to the Will, and I said I knew nothing. Did you include in that with regard to the deed. I first learned about the deed when I called on Mrs. Magaw to carry her some cake, some angel food; it was about two days before the deed was made. When I got up there she told me she wanted her "promise". She meant Mr. Forrest. I knew that she called him her "promise". I said "Mr. Forrest?" And she said, "yes, I want him quick, quick". She repeated the word. I said "What for?" I wondered what was the matter. She told me that she was afraid that they would contest the Will.

Mr. McDivitt: What were her words.

The Witness: It is impossible for me to remember everything. I only tell you what I understood from what she said: I cannot say just what the words were. I do not know who "they" were because I did not know who her family consisted of. She said she was afraid they would contest her Will; that is as I understood; that is the meaning I gathered from what she was trying to say. I asked this question. "Has anybody a right to contest it?" I did not know but that she had children who would contest it, and I asked her the question. She said, "No; they have had their shares, and they have enough. This is all mine". Nothing more was said then but that she wanted her "promise", and she wanted him
236 quick. He was downstairs at the time, although I did not know it when I went to call on her. Afterwards I learned that he did come. I went out before he came in but I learned about

it afterwards. The rest is all hearsay. I gave her the cake and she enjoyed it. We talked a little bit, and that is about all there was to it. She did not tell me about her property; I never knew what property she had, whether it was one hundred or sixteen hundred. I do not know anything about it. I have related all the conversation she had in respect to the execution of this deed or the making of this deed; all that I remember. I do not know how I happened to go there at the time Mr. Forrest was there; just that I happened to be there; I was not there by appointment; at the time this conversation took place it was two or three days prior to the execution of the deed as I learned afterwards. I remained at this time with her perhaps ten or fifteen minutes; I never made a long call. I cannot tell who was present at the time; I do not remember. I called to see Mrs. Magaw and really do not know who else was there.

Q. When did you next learn about the deed? A. I think I saw it next in the newspapers; I was not present at the time of its execution. I have stated all that Mrs. Magaw said to me in respect to her desire to execute this instrument at this time; I have told it all. She did not tell me what she wanted; she did not go into details; I do not think I can say anything more about what she said at that time. She did not say anything more about it. Of course we conversed about different things; at that time I think the whole conversation was in regard to things down at the church. She
237 did not express to me what her purpose was in making the deed nor for what object she was going to give her property; I did not know anything about it; she only wanted her lawyer to do something about her will. I do not know whether it was a deed or what it was; I do not know anything about it; there never was anything submitted to me about it. Prior to this conversation I had with Mrs. Magaw I did not know anything about her affairs. I did know about the codicil to the Will afterwards by hearsay. That is all. At the time of this conversation with her I knew then that she had made—I did not know whether it was a codicil to the Will or the original Will. I had heard she had done something for the Woman's Missionary Society. I had not heard what it was. I did not know anything about her property at all. I should say I saw her about two or three times a month about the time she executed this deed; two or three times during that month. I do not think I usually stopped more than 15 or 20 minutes; perhaps a half hour. Of course we would get to talking and the time would pass. She never herself said anything to me about the codicil to her will, or the will itself. Generally the subjects of our conversation with her when I called to see her were about affairs at the church and missionary work. She was the most interested in the Foreign Missionary Society: I think I was then the president of that society; I am not certain whether it is an incorporated body, this society of the Metropolitan Church; the National Society is incorporated and we are an auxiliary and our society at the church is incorporated; only as we are an auxiliary to the National body. I did not at any
238 time read to Mrs. Magaw. I never had *nay* business relations with her, any money business relations with her; I

was simply a friend and a church visitor. I was present during the last year of her life at social gatherings when she was present. We had a gathering in the parlor of the Hotel La Fetra. We had a missionary and his wife there from South America and we had a reading exercise. I gave a map lesson. She sat just opposite the map as I was explaining it, and I looked around and she seemed to enjoy it. After I was through and I went and sat down beside her and she seemed to be glad to have me sit down beside her and talk about the map and about what was going on. Mrs. La Fetra talked to us at that meeting—Mrs. Ira La Fetra, the missionary, and showed some pictures. It was an unusually pleasant evening. Mrs. Magaw had come downstairs dressed in a pretty silk dress and a real lace collar. I complimented her on her dress and collar, and we talked considerably. I congratulated her that she was talking all right, that she did not use a wrong word once while she was in that conversation. She said, "I am so glad", and I said "I am glad too, you will get all right yet and be well". This was Feb. 12 or 13, 1907. Just before that time I was up in her room one day and it was difficult for her to talk. She was not quite as well as usual and it was difficult for her to get the right words. She spoke of "promise", and "spirit" and so forth; and finally she got out of patience with herself and she said, "Why can't I say it, why can't I get the right word". I said, "Oh, you will some time", and I told
her about one that I had known that had had the same
239 trouble and got so that they could talk well. And so when I
was talking with her that day down in the parlor I said, "You know I told you so". She said, "oh yes, you did." I was describing the work carried on by our missionaries in different islands in the world, and the map was of the island world—Foreign Missionary work. Ira La Fetra and his wife, missionaries to South America, were present. There was once after that that I was up in her room and she called in her nurse. I do not know who it was; it was someone who was with her at that time. She asked her nurse to go to her desk and bring her out a certain paper, and the lady brought out a lot of papers and Mrs. Magaw looked them over, and handed over some papers to me to look at. They were certificates of stock or bonds, or something of that sort, on New York or Brooklyn, I cannot remember which it was; but they represented considerable money. I said, "That is fine". She took them and looked at them and said, "Not worth the paper they are written on". I think this was in March or late in February, 1907, and the very next call after I saw her in the parlor, and I was again surprised to see that she showed such excellent language; she was improving in language and in her power to speak. At the hotel table I was frequently in there for my lunch, and I would sit at the same table with Mrs. Magaw and talk with her during the meal, during the last year of her life. She was a lady always. I never saw anything in her manner that was not ladylike, and she ate like a lady. I never saw her eat with her fingers. Referring to the testimony of other witnesses that when
she was in this condition during the last year or two of her
240 life she used, sometimes, profane language, sometimes indecent language, I should say they must have misunderstood

her; I never heard such language used by her; she was a lady and a Christian, and showed it in her conversation. There were differences apparently in her powers of expression at different times when I saw her. When she had those sick spells she could not talk as well as when she was well. I do not mean that she was well even in this February or March affair but she was much better and had so much better command of language; I should say that she was at her worst, that is in respect to control of her language just after her first attack in 1905, and that she was at her best in 1907. If I ever had any conversation on business matters outside of the times I have mentioned, they were general, because I do not remember anything in particular. When she told me that she wanted to see her "promise" not much of anything had preceded that. I had just gotten in, and she was so eager. That was the only thing she wanted to talk about. I never saw her when she was not able to think for herself, and to decide for herself, and she always did decide things in a peremptory way. She made us understand that she knew what she was saying. I knew from her conversation with me that she knew what she was talking about, and I knew from her quick decisions that she was a woman of good business ability, whenever any question came up.

Mr. McDIVITT: I move to strike out what the witness says she knows about Mrs. Magaw, on the ground that it is entirely a conclusion.

241 Cross-examination.

By Mr. McDIVITT:

My name is Mrs. Lydia H. Tilton; I am not now president of this society; Mrs. La Fetra is now president. I certainly should like to have Mrs. Magaw's deed carried out, just as I would like to have my mother's Will carried out. I would like to have the codicil referred to, sustained and carried out; that is what I am here for; I want it carried out. I want to do everything I can to sustain those two instruments and have them carried out. I want to do everything I can to sustain those two instruments and have them carried out. I am her friend although she has gone to Heaven. If I knew how, I would oppose any attempt on the part of anybody to attack those papers. There were other ladies of that society and of that church who called on Mrs. Magaw during the last year of her life; I do not know how many others. Some of them were Mrs. Tasker, Miss Gray, Miss Snell, Mrs. Bishop Bristol. Mrs. La Fetra could give more than I could, because she was right there; but I know of them calling on her. I do not know whether there were others whose names I do not now remember or recall, I know there must have been others because they were all interested in her; but I was not there always. I think it was the habit or custom of many of the ladies to stop in and see Mrs. La Fetra frequently; we all loved her well enought to call on her. Mrs. La Fetra is one of the moving spirits in this society; she takes an active interest in the work or any work she has anything to do with. She was at the

head of the hotel and she has been active in W. C. T. U.
242 work, in the Crittenden Home work, and every public work that women have had any thing to do with in this City, she has had a hand in and has helped. Mrs. La Fetra is a very public spirited woman; I would say she is successful in her undertakings. Mrs. Magaw loved Mrs. La Fetra and Mrs. La Fetra did a good many things for her, the same as she would for her own mother, and Mrs. Magaw's statements with regard to that were worthy of Mrs. Magaw. She appreciated everything. I cannot say very much about whether she depended somewhat upon Mrs. La Fetra's kindness and advice. I think Mrs. Magaw advised herself. I never knew her to swerve from her own opinion. I have attended the hearings in this matter. I was in Baltimore when the last hearing before this took place. I was here except for that one. Mrs. La Fetra's hotel and home were a sort of meeting place for missionary ladies; they always knew they had a home there and she helped them with her money and with her love; and brought them into association with us of the church. She would invite us there to meet them. I hope she never lost any opportunity to assist the society in every way that she could. I think that Mrs. Magaw referred to Mr. Forrest as "promise," because I had talked with her before and she always called him her "promise." Mr. Forrest had been in her room when I was there. She referred to him as her "promise" then; she called him her "promise" I do not know why. I thought at first because he had promised to come. I do not know that I ever heard her call him Mr. Forrest myself; I do not remember; I mean when she was sick. Of course before that she called him Mr. Forrest. I said that she said, "My promise,
243 my promise; quick, quick;" that was in May 1907; just before the deed; two or three days before the deed was made out. He was there when I was, but he had not come to the room while I was there. I do not know that I ever heard her refer to anybody myself, in 1907, by some other than her or his own name. She would talk about our Pastor, Dr. Bristol; but I think she called him by his name; I think I am sure of that; I think she said "Dr. Bristol." I do not think she referred to him in any other way but by his own name; I think she said "Dr. Bristol;" I am inclined to think I am sure of that. She did not call him her "kingdom" to me. I have heard her use the word "kingdom" but not referring to Dr. Bristol. I do not know to whom she did refer. This was when she was worse; when she could not talk as well; I should say back in November or December, 1906; but it was when she could talk better that she was talking about church people and calling them by name. I should say that was in—I say now that she was at her best in February so far as I remember, February and March; I do not know just exactly the period. She declined after that but I do not think she declined so very much until very near her death. She used good language after February, from the time I saw her; good language. I think I have heard her use the word "promise" after February, 1907. In May 1907, when she was talking to me she said "promise, my promise;" but the other names I do not remember of her using; and from her

words I have no way of knowing she meant Mr. Forrest, except as she had previously referred to him as "promise." If that had been done the first time I heard her use the word "promise," I
244 should have known from what she told me that she wanted him, that it was her business manager she wanted, and I knew that Mr. Forrest was her business manager. She did not say the words "business manager" but she told me what she wanted him to do. She said she wanted something done about her will; that is the amount of it. She said she was afraid they would break the Will. Now I do not know who "they" referred to. But from what she said I knew she wanted the man who did business for her. I knew she wanted someone to do business for her, and I knew that Mr. Forrest was the man who attended to her business for her. I knew that Mr. Forrest was the one she trusted to do the business for her. I never heard of her speak of her son, Van Brunt, by name. I never heard her speak of any one of the family by name. That is, I do not remember of having heard her speak of any member of the family by name. None of the family were with her at any time when I was there, not that I know of. I was not up in her room when they were there; I never met any of them I never heard her refer to any of her family in any way with the exception of the time she used the word "they," of course at this time I speak of when she said "my promise, my promise, quick, quick," meaning Mr. Forrest, she was not as strong or as sprightly as she had been ten years before; she was an elderly lady; she was gentle and polite and kind and quiet; she exhibited a Christian spirit as strongly as any woman I have known; and when I say that I never saw her when she could not talk I mean that there was no time when I could not understand what she meant. I think at this time, in May, 1907, that a person who had never talked
245 with her before would have experienced some difficulty in knowing at once what she meant when she talked. When she spoke about calling Mr. Forrest she did not use the word "deed" or "codicil," I am sure of that. I had heard before that there was a codicil; I heard she had done something for the Woman's Foreign Missionary Society. I do not know whether it was a Will or codicil, or what it was; I cannot tell you who told me, somebody down at the church. I think it likely it was Mrs. La Fetra. It would have been natural for her to tell me. It probably was either Mrs. La Fetra or Mrs. Huntley; somebody who knew about it at the time; somebody familiar with it. She appeared to me to be about the same in February as in May, 1907. She was just as old as she was in February, only a few months difference, and she was not strong of course; she was a very weak lady at that time; she was afflicted physically and I knew she had a nurse to take care of her and sleep with her. I did not know what property she had; I did not know a single thing about it; I judged she was a woman of some means from her contributions to the society; she gave $200 at one time; and I think she gave $100 at another time; they were generally when we were closing up the business for the year, it seems to me, about September, perhaps September of the different

years. I referred to a social gathering at which I gave a talk and had an interesting map; it was a map of the island world; a representation of all the islands, the largest of which was Australia, and the talk was with regard to what had been done in those islands—John G. Peyton, in the New Hebrides and others in the different parts of the world. It was a regular map we had purchased,
246 a large map. I said that Mrs. Magaw spoke specially of the map after I had finished. She was interested in what had been done by those who worked there. I had pointed out on the map those places, and she was glad to see them; it made it more clear to her mind what was going on by having the map before her and the surprise to me was that she did not mispronounce a word or fail to get the word she wanted to use in the conversation. That was in February, 1907. She thought it a fine map. She had never seen so fine a map representing all the islands. I cannot remember all that she said, of course. The map was pinned on the wall. It was not taken down and handed around for people to look at, it was a large map. That was in February; I do not remember whether it was the 12th or the 13th of February, 1907. She seemed so well and happy. She must have seen better, because she was across the room from the map. Of course it was a large map. I am aware that she was practically blind. I knew that sometimes she could hardly see at all, and at other times she could see better. I never saw her read; but that does not prove that she did not read. I never heard her read. I never saw her write. I knew they did read to her, but I was not present. Mrs. Magaw was as far from the map when I was talking about it as I am from Miss Fague now. (Miss Fague is seated at the further end of the table across from the witness.)

Mr. LEIGHTON: This table is about seven or eight feet.
Mr. MCDIVITT: We will say then, 12 or 14 feet.
Mr. LEIGHTON: Yes.

The WITNESS: The map was in colors.

By Mr. MCDIVITT:

247 I never saw her in one of her fits of anger. I never knew she had one. I never knew that she was cross. I have seen her indignant when people wanted her to do something she did not want to. That is what I would call righteous indignation. Simply that somebody wanted her to do something she did not want to do. I do not think I could explain what it was. She never treated Mrs. La Fetra that way; not to my knowledge. My work is more in the foreign missionary society. I never suggested to Mrs. Magaw the making of any contributions to the society. I do not know anything about it. But I received this morning a letter from a woman who said she did. That is all I know about it. Her name is Mrs. E. B. Stevens of Baltimore. If the Missionary Society gets any money out of this she thinks she has gotten it for them. Her address is 2116 Oak Street, Baltimore. She used to live in Wilmington. It seems that she knew Mrs. Magaw,—by this—(reading) "I went to see her often, writing in advance that I was coming so as

not to miss her. I had much to do in awakening in the mind and heart of the good woman an interest in our work and the woman for whom it has done so much." This Mrs. Stevens was not a member of this society in Washington. She was a member of the Methodist Church and was the corresponding secretary of the Baltimore Branch of the Woman's Missionary Society. I knew her during the lifetime of Mrs. Magaw. I knew both of them. I did not know she called on Mrs. Magaw. Of course we did not know this woman had so much influence. I would have a preference for foreign missions simply because my work was there. If I were to ask
248 anything like a donation to missions I would ask them to help me in my work. If I was president of the Home Missionary Society I would look out for them too. We are all members of both societies and both have to be helped. I do not think Mrs. La Fetra at this time was an officer of our foreign missionary society except as a member of the general branch; the last year she was. Last year she was elected President of the missionary society of our church or local society. I think that Mrs. La Fetra has an interest in her work equal to mine in my work. She does more for the home than foreign, and so do I, we all do because the home is right here and there is so much need we have to. We have to give more and work more for the home all the time. And yet officially my special work is that of foreign missions, but you cannot see the suffering right around you and do nothing, if you have any heart. Part of our home missionary work is this training school here. Some money goes to the Indians in America; some to the mountain whites in Kentucky and Tennessee; some here and some there. It is all one work. My work is in the foreign missionary work and I have to look out for my line of work—just as two regiments of the same army. I expect those who are actively engaged in home work to look after their end of it. I am an officer of both societies. This Mrs. Stevens is not as much interested in home missionary work as in the foreign, I think, because for years she has been a very faithful worker in the foreign work and she only had so much strength. I do not know whether she is entitled to any credit, if anybody is, for interesting Mrs. Magaw in foreign missions.
249 I know she is a grand woman and would do what she could to interest people. She is a lady about as old as Mrs. Magaw.

Redirect examination.

By Mr. LEIGHTON:

Q. State whether or not your interest in the missionary work is of such character as to cause you to color your testimony in order to support this deed? A. Just the same as I would lie about anything.

Q. Will you answer my question. Would you or would you not color your testimony in order to support this deed? A. I would not color my testimony for anything.

Mr. McDivitt: Who came to see you and what was said?

By Mr. Leighton:

Q. Go on and make your statement in your own way. A. I was sent for to call and see Mrs. Magaw. I called and she informed me that she wanted to make a deed out——

Mr. McDivitt: I object to all this on the ground that the witness is not stating the words and facts, but conclusions of his own mind, and I shall move to strike it all out.

By Mr. Leighton:

Q. Go ahead.

The Witness: She said she wanted me to write her a deed, deeding the two pieces of property that the will calls for to Mrs. Huntley and Mrs. Tilton and Miss Fague. I insisted that she allow the will to stand as it was and not have a deed, that the will would take the place of a deed and it was not necessary to write the deed. I refer to the codicil of the will.

Q. And she insisted on having the deed prepared? A. Yes sir; she insisted on having the deed prepared.

Q. How many times did you go there before the deed was finally drafted and executed? A. I prepared a deed and took it to
254 her and read it over to her.

Q. State all that transpired at that interview? A. After reading the deed over to her she said she wanted the other house also deeded, so that the missionary people, or the foreign missionary people, would get that house also. After spending some time with her and talking over the matter with her I said I would go back to the office and prepare another deed. I came back to the office and thought seriously over the matter, after I found out exactly what she wanted, and I got all the data I had and brought it around to you, Mr. Leighton. I told you the circumstances and facts and asked you to prepare the deed as you saw fit. The deed was prepared by you. It was then handed to me. I took it to Mrs. Magaw, read it to her, and left it with her I think a day or two.

I had some conversation with her at the time I took this deed to her. The last time we talked over the deed. Of course the exact conversation I could not give to save my life. I suppose I remained at this time maybe ten or fifteen minutes. I often stayed there and talked wtih her a while, when I went to see her on business. It was one or two days before she executed the deed, I could not say exactly. When I called the last time I stopped downstairs and asked Mr. Ed. La Fetra if he would not go upstairs with me to witness a deed. (After examining deed.) That is the signature of E. S. La Fetra. His office is 32 Broadway, New York. At the time the deed was executed Mr. La Fetra accompanied me up there to Mrs.
255 Magaw's room. I read the deed over to her and she signed it. acknowledged the same to be her act and deed, and Mr. La Fetra and myself witnessed it. She asked me to have it put on record, which was done. I think that Miss Lewis was present also; I am not positive. I went there two or three different times before the deed was finally in shape so that she executed it. I did not go by

appointment with her not exactly. I told her I would be there to see her again; no time was fixed. I had something to do with the preparation of the codicil to a will. I prepared it. I was sent for by Mrs. Magaw to call and see her, that she wanted to see me on some business. I called and she told me she wanted a codicil written to her will, and asked me if I could do it or would do it and I told her I would. I saw her three or four or five times in respect to the drafting and execution of the codicil. After she told me what she wanted, or as she would tell me, I would make a little memorandum on a piece of paper, and I prepared several codicils and took them there and read them to her. They were not just what she wanted, and when I finally got just what she wanted she said that was right, and it was prepared and made a part of the will. I was present at its execution. The day it was executed, if I remember aright, the codicil had been left with her for two or three days; the codicil and the will were together at the time. Before she executed it I told her we would have to have three witnesses and it was talked among the folk there who should be the witnesses. We wanted somebody in the house to make it convenient, and Judge Doane, Miss Lewis and myself witnessed the codicil. At the time I left the codicil with her,

as it was finally executed, I had a conversation with her in
256 respect to its provisions. The first or second codicil I was preparing would have given the house 207 B Street back to the family or heirs, the way the codicil was prepared, and she insisted that it go to the foreign missionary society, the same as the other two, at the death of Miss Hettie Fague, who was the party the codicil left it to. A number of times something was said about Miss Fague. Mrs. Magaw did not want Miss Fague to know what she was doing for her. She wanted everything done on the quiet in regard to Miss Fague. She said that Miss Fague had been very kind and good to her and she wanted to do something for her after she was gone. At none of these interviews was Miss Fague present. Miss Fague, I believe, was in the hospital at the time, and Mrs. Magaw thought that was a very good time to make the codicil of the will, so that she would not know anything about it, while it was being done, for when she was there she was staying there day and night. Mrs. Magaw said that to me. When the deed was executed, or when the interviews were had in regard to its execution, I am not positive whether Miss Fague was ever there when I went to the house. You are speaking of the deed now; she may have been. If she was there she was invited out of the room, because Mrs. Magaw did not want her to know anything about what was going on. She said she was very anxious to leave her property to the foreign missionary society that she was very much interested in it; that her people had plenty, and she was very anxious to leave a monument to herself and husband. Of course she said a great deal more than that but that is about what it amounted to. She said the members of her family had plenty, and they did not need it, and they had not

treated her as well as they might have done; that she did not
257 care to leave anything to any of the family; that her sons, or grandsons—and she always mentioned that, and said that there was a son and a grandson that she spoke of as the black sheep of

the family, and that she did not want them to have any of her estate. She mentioned them by name, but I am not positive that I could remember the names. I received the will, either from Miss Katie Lewis or Mrs. La Fetra; one of them got it out of Mrs. Magaw's desk. I think Mrs. Magaw, if I remember aright, told them where it was and they got it out of the desk. When I went to see about the drafting of the codicil the will at that time was in an envelope, not sealed, but was wrapped with a piece of red tape. It was handed to me and I read it over to those who were in Mrs. Magaw's room and in her presence. I do not know how many were in there but Miss Lewis was not present. She might have handed me the will, but she went out afterwards if she did hand it to me, because she was not there when the will was talked over. I do not remember whether I took it away when I went to my office. After the execution of the codicil Mrs. Magaw came to me and asked me to keep it for her. She did not want Miss Hettie to know what she was doing, that is, Miss Hettie Fague, and I suppose that is why she wanted me to keep it, and I took it to my office and locked it up in the safe. I said I advised her to allow the codicil to remain instead of executing the deed. I thought that was sufficient. She gave a reason for desiring to execute the deed. She said she wanted the deed made out and executed and put on file at once; that she was afraid her people would try to break her will, and she thought it was safer to have
258 the property deeded. I tried to persuade her otherwise, but she would have her way, and I allowed her to have her way and the deed was prepared. I talked with her, though several days, at different times, before the deed was prepared, trying to persuade her to leave the will or codicil to the will stand as it was. I did not advise her to execute a deed. I had charge of her three houses, collecting the rents and looking after them. Her property consisted so far as I know, of 207, 209 and 211 B Street, Northeast. I collected the rent for those houses about eight months, I think, from December 1906, to August 1907. I did not have any other business relations with her.

Q. About a loan of money—did you ever make a loan for her during the period of your agency? A. Yes sir. In the month of May, 1907, I called to see Mrs. Magaw, as I used to drop in there whenever I had a chance, sometimes once a week and sometimes maybe oftener. On one occasion I dropped in to see her and Mrs. Magaw had just received a letter from her son, Mr. Van Brunt Magaw, advising her to invest $1200 that had been her portion, I think—I read the letter at the time—her portion of settling up a piece of real estate, which I believe was sold. In that letter Mr. Magaw had advised her to invest the money here in Washington, that he did not care about investing it there in New York. She asked my advice about it, and I told her I thought I might be able to invest it. Within the next week, I think it was, I had a chance to invest it. It may have been in that week. I placed it out at 6 per cent. interest. The amount of the loan was $1500. She
259 gave me a check for the full amount of $1500. I heard her say she would have to get a commissioner to come there and execute a paper for her. I did not see it done. I was a notary my-

self and she said, if I remember aright, that she was compelled to have a commissioner of deeds.

Mr. LEIGHTON: I notify counsel for the complainant to produce this paper, of whatever kind it was, or a copy of it, at our next hearing; and the letter written by Van Brunt Magaw, or letters written by Van Brunt Magaw in connection with the transaction, and also letters signed by Mrs. Magaw, in respect thereto.

I looked over my books, and as near as I can get it—there is no date down—it is about the 25th of May. It may have been in June, but I have not any date at all. It was either in May or June, but I think about the 25th of May. These houses were in very bad condition. Mr. Banes was her agent prior to my acting as her agent. All three of these houses were not rented at the time I took them; two of them were but one was vacant. I spent a good deal of money in putting them in condition. Every time I went to her in regard to repairs she and I talked over the matter and she always advised that she wanted the houses kept in perfect condition. I would never do any repairing without consulting her. The cost of these repairs was met by deducting the expenses from the rents. I rendered her accounts monthly, I think, unless the expenses would amount to more than the rent, and then, of course, I would have to let it go until the second month. This continued until her death. I did not
260 have any other business transactions with her other than those I have enumerated during the period of my agency. There was a difference at different times in the power of expression of Mrs. Magaw. Sometimes it was difficult for her to express just what she wanted. And she would leave a word out or put a wrong word in, and we would at times help her out and she would say, "Yes, that is what I mean." Often when she would use a wrong word she would call your attention to the fact that that was not the word she wanted to express. She was conscious of her infirmity of speech. At times I would understand everything that she said. She said it distinctly and her sentences were correct. Then again she would use the word "promise," or "service," in the place of the word she wanted to use. Then we would help her out, "try something else," we would say "You mean so and so," and she would say "Yes, that is what I mean." And if we did not understand her she would make us understand. It seemed like she felt a little badly when she could not express just what she wanted to say. I think her condition in respect to her powers of expression during the months of February and May were good. She seemed very bright. The last time I saw her alive was the day before she died. I could not say when before that. I am sure she recognized me. I spoke to her and shook hands with her and passed a few words with her. She was then propped up in a chair, I think it was. I could not say exactly how many times I saw her during the last month of her illness; I would say several times During the period covered by my agency I would see her on an average of five or six times a month maybe. Those visits did
261 not arise from business altogether. If I was up in that neighborhood calling on Mrs. La Fetra or Ed. La Fetra, I would go

up and pass a few words with the old lady. She seemed always to enjoy company, and I would sometimes put myself out to go up and spend a few minutes with her. From my business transactions with her and my interviews with her in my judgment I considered that her capacity or power to make a valid deed or contract during the month of May was perfect in every respect. After her death I saw Mr. Van Brunt Magaw, the day of the funeral. As to the reading of the will I made myself known to Mr. Van Brunt Magaw and told him I had his mother's will at my office, and whenever he would like to hear it read, if he would call at my office I would show it to him. A few days after the burial of his mother he and his nephew, Mr. Robert Magaw, called at the office and I got the will and also the deed out of my safe, and read them both to them—read the will and then read the deed. Before reading the will I asked them if they knew their mother had made a codicil to the will, and they said no, they did not. After reading the will and the codicil, Mr. Van Brunt Magaw, the son, stated that it was pretty hard but that was his mother's will and no doubt it should be carried out, as he expected to make a will and wanted it carried out as he made it. The nephew, Mr. Robert Magaw stated that he was not surprised, that his grandfather and grandmother were always great missionary people and he was not surprised that she left her property to missions. The remark of Van Brunt Magaw was subsequent to that reading of the codicil.

262 Neither of these gentlemen saw me in respect to the affairs of Mrs. Magaw during the period of my agency. I never met either of the Magaws until after the death of Mrs. Magaw. No member of the Magaw family called. I never met any one of them. I had a conversation with Miss Bertie Lewis, one of the witnesses to the codicil, at the time the codicil and will were lodged in the probate office. Miss Lewis met me in my office by appointment, with Mr. J. T. Hunter, the attorney for Mr. Van Brunt Magaw, and she and I were to go to the Probate Court and witness or swear to Mrs. Magaw's will. I mean the will and the codicil. On the way down I asked her if she knew what we were going down there for, and she said, yes to witness the will. I said, "Of course you understand when we go there we are to swear that to the best of our knowledge and belief Mrs. Magaw was sane and was competent at the time she signed the will to do so." She said, "Yes, of course I can easily swear to that."

There is something I would like to state, and it is this, that before the property was turned over to me, Mr. Van Brunt Magaw signed an order—I was going to say, after Mrs. Magaw ordered Mr. Banes to transfer the property to me Mr. Banes positively refused to do it without an order from Mr. Van Brunt Magaw. He went to an attorney, Mr. John Ridout who prepared a paper and sent it on to Mr. Magaw for his signature, a paper turning the property over to me. After Mr. Magaw signed it and returned it to Mr. Banes the property was turned over to me to look after.

Cross-examination.

By Mr. McDivitt:

263 This last statement that I have made was volunteered by me without any question. I suggested this subject just now for the record because I thought it ought to go on the record, simply because it had not been brought out, and I thought it a good point for the defendants, if you want to use it that way. I am not acting as counsel for the defendants in this case. I am interested in this case that justice should be done. It depends upon who you call my friends whether I am interested that my friends shall succeed in this case. Mrs. La Fetra has nothing at all to do with it. Mrs. La Fetra is a friend of mine. I hope she is. I certainly am a friend of hers. She has known me 18 or 19 years, maybe 20 years. Mrs. La Fetra ordinarily calls me "Charlie" when she speaks to me, I am glad to say. I have been in business about nine years, in the real estate business. Prior to going in the real estate business I was in the United States Army as a quartermaster, for fourteen months. Prior to that I was solicitor and claim agent for the Adams Express and the Southern Express companiees in Washington. I would say I was engaged in that work ten or twelve years. I do not think I have ever testified in a legal proceeding before. I believe I have once or twice been called as an expert on real estate matters. I did not suppose you meant in that way, regarding real estate. I have been a witness in courts, yes sir—several times. I did not exactly understand what you meant. I supposed you meant in regard to a will case. I am a member of the Metropolitan Methodist Church, mentioned here, and proud of it. I am a Steward and I am Treas-

264 urer of the Metropolitan M. E. Church. I have held those offices for some time. I am acquainted with the defendants Mrs. Tilton and Mrs. Huntley. I know them to be actively engaged in the missionary work in connection with the church. I am a member of a missionary society connected with the church. I am an honorary member of the Young Women's Foreign Missionary Society. I am not an honorary member of any other missionary society, connected with the Methodist Church. I testified that the only property that Mrs. Magaw put me in charge of was three houses on B Street. Certainly I know it is so. She had no other property that I know of. I have no recollection of ever collecting some other income for her. I made an investment for her. I know she had some mortgages; only by her telling me so. I know where they are, what property the mortgages affect. She showed me her books— She asked my advice about her business affairs; she talked to me several times about her loans. I have had possession of some of her legal papers, besides her will and the codicil. She gave me a number of her old papers to look over and to see if they were any good—deeds of trust, etc. I advised her about that. I looked over them. They are in my office, I think. They were taken to my office several months prior to her death. They are worthless, all of them. I advised her regarding the loan of $1500 which I have mentioned. Real estate security was given for it. The property was on

Q Street, northwest—1431 Q Street, northwest. I knew the property myself. I examined it for the purpose of making this loan. I knew the property before that. I would say I have known the property several months. I have had dealings since. Sometime be-
265 tween the time of the making of the loan and the date of Mrs. Magaw's death I came into control of the property myself, and at the time of her death I controlled it. Mr. Christman really controlled it when the loan was made. He did not live on the property. Really I cannot tell you where Mr. Christman lives now. I never did know where he lived. His business is at 9th and Pennsylvania Avenue. He deals in real estate. When I went to the probate court with Miss Lewis nobody representing the probate court advised me that I ought not to try to probate this codicil, as long as there was a contest pending; Not that I know of. There was something said, but not that it should not be done. Nor that it ought to be done. If I remember aright our attention was called to the fact that there would be objection to the will, but if I remember correctly the papers had not been filed yet, but nevertheless he would take our acknowledgment. I thought it was wise to sign it while I was there. I did not bring Miss Lewis there. She went with me at the request of Mr. Hunter, the attorney for Mr. Van Brunt Magaw. Mr. Hunter told me that himself, that he had told Miss Lewis to go with me. I know Mr. Hunter myself. He is not my attorney in some matters, I would not say that at all. I have never said he was my attorney in some matters. I might have had him in connection with one or two Justice of the Peace matters, in the way of bringing suits for the possession of property, or something of that sort. He is not my regular legal adviser. He had an office in my building, but now he is a resi-
dent of Auburn, New York. I thought he was a pretty good
266 lawyer. I had no use for an attorney. When I did have use for an attorney I did not at all times use Mr. Hunter. I have only had use for an attorney once or twice. I have never had anything very important in the way of a lawsuit, in the way of any legal matter. It was I who suggested Mr. Hunter as an attorney for Mr. Van Brunt Magaw in this estate *am*tter. I drew this codicil. I have never studied law. I do not make a specialty of drawing wills and codicils. I have drawn a number. I thought it was important enough to advise with somebody about, and I advised with Mr. James T. Hunter, the attorney we have been talking about. I drew the codicil. I followed his advice in some respects. I do not think I did in all respects. I remember when I was first employed to represent Mrs. Magaw. It was not my habit before my employment with Mrs. Magaw to call upon her frequently.

Q. Is it not a fact that after Mrs. Magaw became dissatisfied with Mr. Banes, as to the handling of her property, that Mrs. La Fetra told you something about that fact? A. You will have to make that a little plainer.

(The question was repeated by the stenographer).

Q. Would you like to have me ask you the question again? A. Yes, sir, I would.

Before I was employed by Mrs. Magaw I did not know that she was dissatisfied with the way Mr. Banes handled her property. She sent for me and then the property was turned over to me.

267 I did not know prior to that. I think she sent Miss Lou Wilson. She just stopped at my office and told me that Mrs. Magaw wished to see me in regard to her property. When Mrs. Magaw wanted to see me she frequently telephoned to me. I have been telephoned to but she did not do it herself, I suppose. I could not say who did it. I think that on several occasions Miss Hettie Fague telephoned; and maybe somebody from the La Fetra Hotel would telephone; but who of course I could not state. Miss Wilson called at my office on her way to her office and told me that Mrs. Magaw wished to see me in regard to looking after her houses and for me to call at the hotel which I did. Miss Wilson lived at the La Fetra Hotel at that time. Mr. Banes is not a member of the Metropolitan Church. To the best of my knowledge Miss Fague was present when I called to see Mrs. Magaw first, about the transfer of her matters from Mr. Banes to myself; I think Mrs. La Fetra was present. They all talked; everybody joined in the conversation.

Q. And you say Mrs. Magaw declined to sign the deed several times, in the form in which it had been prepared? A. No, sir, not the deeds; the codicil.

Q. Did she sign the deed the first time that you presented it to her? A. She did not.

Q. Then she did decline to sign it once as it was prepared? A. No. When I first presented it I did not want her to sign it then. I wanted her to look it over and see if it was satisfactory.

268 Q. And then I say she did decline to sign it as it was prepared at that time? A. No, because I did not ask her to sign it.

Q. Was that deed signed? A. Which one?

Q. The first that you presented to her? A. No, sir.

Q. Then she declined to sign it, did she not? A. No sir, it was not satisfactory.

Q. I asked you whether she declined to sign it. A. It was not satisfactory and I did not ask her to sign it. As a notary I was to take the acknowledgement, and I did not ask her to sign.

Q. You understand me. You had the deed prepared and submitted it to Mrs. Magaw for her approval? A. Yes.

Q. And she did not sign it as it was prepared? A. It was not prepared as she wanted it.

Q. And for that reason she did not sign it? A. She was not asked to sign it.

Q. I do not ask you that; but she did not sign it because it was not prepared as she wanted it? A. I cannot answer that question.

Q. Then you do not know why she did not sign the deed as it was first prepared? A. Yes, I do.

Q. But you cannot answer whether it was not signed because she did not want to sign it in the form in which it was then prepared? A. She did not say she did not want to sign it.

269 Q. No, she did not say it, but are you able to state that it was not signed because she did not want to sign it in the form in which it was prepared at that time? A. I cannot answer that for Mrs. Magaw. I could answer it for myself but not for Mrs. Magaw. I prepared or had prepared a second deed and presented it to Mrs. Magaw and that was left with her for some time; that was the one that was signed; I left it with her one or two days; maybe three days; I would say I called to see her two or three times between the time that she signed the second deed and the delivering to her of the first deed that I prepared.

Q. Was it difficult for you to understand what she meant, or was it difficult for her to understand what you meant? A. She could understand what I meant a great deal better than I could understand exactly what she meant. I do not think Edward La Fetra and myself were the only two that were present when the deed was signed; there may have been one or two others there.

Q. Well, Miss Fague was there, was she not? A. I could not say positively whether Miss Fague was there; I was calling there so often; I am pretty sure Miss Fague was not there when that was signed because her name was mentioned in the deed, and when the deed was read over to Mrs. Magaw before signing, and her name was mentioned in there, Mrs. Magaw said she did not want Miss Fague to know anything about what she was doing; that she wanted to make it a secret; so I am positive, on this ground, that Miss Fague was not there; I could not positively state who else
270 was there.

Q. Is it not a fact that during your visits to Mrs. Magaw generally, that Mrs. La Fetra was present? A. At times she was. I could not swear positively now that Mrs. La Fetra was or was not present when that deed was signed. I am not certain. If I knew positively that she was there I would gladly say so. At my first interview with Mrs. Magaw about this deed, I think Mrs. La Fetra was present. When I first went to see Mrs. Magaw about the deed, I say Mrs. Magaw sent for me and I went to see her at her room, and that there was a conversation about it; I do not know that I can give you her exact words, I can give you them as near as I can; it is impossible for me to give you her words, because it has been thirteen or fourteen months ago; yes—eighteen months ago; we all talked together; I could give you some of her words; I could not do that exactly; I could not give just the words she used; I remember that she used words such as "trouble", or "kingdom", or "spirit"; she used the word "spirits" sometimes and used the word "promise"; I do not remember her using either of the words at that interview; I remember some of the words she used at that interview; I remember some distinctly that she said; I can give you her words as nearly as I can; give the words that I can remember, that is all I would do. If I could not give you part — her words, and part of what I think she meant, there would not be any sense in what I was trying to say: in what she really said; no one can go back eighteen months and remember word for word that anyone has repeated. When I
271 first went to see her about drawing the codicil, I said I went three or four times about that too. I went to see her several

times about that; I remember the occasion of the first time I went to see her about it, Miss Fague was not there then, she was in the hospital; Miss Lewis was present when I called; I do not know whether she was invited out of the room; she went out of the room after she handed the Will over to Mrs. Magaw or to myself—which I do not know exactly, but she handed it to one of us and the first thing I did was to read the old will. Mrs. La Fetra was present. I can give you some of Mrs. Magaw's words at this interview; in talking about the preparation of the deed Mrs. Magaw told me that she wanted the deed to confirm the codicil or words to that effect.

Q. And your understanding of her idea was that the deed was to be substantially like the codicil? A. Yes, sir.

Q. And that it was to accomplish the same effect, so far as the two houses were concerned? A. So far as the three houses were concerned.

Q. Oh, the idea was that it was to cover the three houses? A. Yes, sir.

Q. And you think that when Mrs. Magaw signed the deed she thought the deed was accomplishing the purpose the codicil would have accomplished after her death? A. She thought it would be much stronger, and that it would stand better in the courts.

272 Q. It would stand better? A. Yes, sir.

Q. And it was to carry out the same purpose? A. Yes sir.

Q. And it was made to do the same thing the codicil was made to do, except that one would hold better than the other? A. She wanted the deed in her lifetime. Whether I was under the impression that Mrs. Magaw was a woman of substantial means depends upon what you call substantial means. I knew about what her investments were at Washington, because she had shown me her book.

Q. According to your definition of substantial, were you under the impression at that time that Mrs. Magaw was a woman of substantial means? A. I would not call $10,000 or $12,000 substantial.

Q. That avoids my question. I asked you whether according to your understanding of substantial you then thought Mrs. Magaw was a woman of substantial means, considering all that she had, not only here in Washington, but anywhere. I want to know what you thought at that time? A. Well for a lady of her age I would say yes. She had enough to see her through her lifetime and some left over.

Q. And you base this upon what you knew of her holdings here in Washington. A. Yes sir, I knew nothing about her other interests. I had never heard from any source that Mrs. Magaw had some interests in Brooklyn and New York only the letter of Mr. Van Brunt Magaw which he had written to his mother when he sent the $1200 to her; and I supposed that closed up her inter-

273 ests in Brooklyn; I do not think I had ever heard anything before that. I have heard that Mrs. Magaw was a woman of some little means—I never heard that she was a wealthy woman. I have no recollection of ever hearing anybody say anything relat-

ing to Mrs. Magaw being a woman of means; I knew she was elderly, I knew she was a sick woman. From the time I took care of her affairs until her death she needed someone to look after her affairs; she could not go out and look after repairs and collect rents. She knew of the repairs done there aside from what I told her; I think she had been out there once or twice. To the best of my recollection, I think she and Miss Fague and maybe Mrs. La Fetra, or someone, drove over there and she inspected the houses I was not with them, so I could not say. I do not know who went in; I do not know anything about it. I could not state how much money I spent on the houses from the time I took charge of her affairs until her death. I cannot state roughly, every cent spent on those houses in the way of repairs, is covered by a voucher, and Mr. Van Brunt Magaw has those vouchers. I would have a memorandum record, but I would not have the vouchers. For instance, carpenter work. I would say simply "Carpenter work." Mr. Magaw would have the voucher. She did not pay me any salary for my services; nobody paid me a salary for my services for Mrs. Magaw. I got a commission on my collections; five per cent. The repairs were deducted out of the rents. I charged nothing for making repairs; not personally; I just paid the carpenter or bricklayer his bill; but I
charged nothing; so that my entire compensation for col-
274 lecting rents, making and attending to repairs, and sending
bills, is included in the five per cent. At the time that either the codicil or the deed was drawn, I did not know what family Mrs. Magaw had; I did not know she had a brother; I did not sometimes disagree with Mrs. Magaw in connection with her affairs that I know of; I always wanted to do just what she wanted me to do as far as I know; I did not oppose her in her desires about her own business; I had no right to do it; no authority; I never found her suggesting anything unwise; I never found her suggesting anything I did not want her to do, except making that deed. I did advise her to leave the Will as it was. I thought it would take the place of the deed, but she insisted on having the deed prepared and executed and put on file. I was not opposed to putting it on file; I was not opposed to having her sign a deed I told her it was not necessary, that I thought the Will would act and take the place of a deed, and that it was not necessary to have a deed prepared. If I said "persuade" I merely meant that I thought there was no necessity for doing it.

Q. If you were her agent and she was paying you, why did you not do as she told you? A. I did as she told me; I hesitated and objected simply because I thought it all unnecessary. I have no recollection as to whether Mrs. La Fetra joined in the conversation about whether the deed should be drawn or not. Mr. Leighton did not draw the first draft of the deed which was presented to Mrs. Magaw. There was quite a difference between the deed that was drawn by me
and the deed that was drawn by Mr. Leighton; Mr. Leighton
275 went further into details to show what was really meant and
what she wanted. Mr. Leighton did not see Mrs. Magaw at the time; not that I know of, and the only way he knew what Mrs. Magaw meant was what I gave him. At the time of the signing of

the deed or the codicil, or both, or at any of the interviews that I had with Mrs. Magaw about either of those papers, she did not appear to be excited in mind. I saw no difference whatever in her appearance at those times from what there had been at any other time; I had seen her from the time I was employed until the time of her death, and that same statement would apply to her actions as well as her appearance. I thought that Mrs. Magaw's power to make a contract, her mental powers to make a contract, were perfect in every respect.

Q. Do you think that if Mrs. Magaw and I, as a stranger to her were making a contract or a bargain, that she would be able to get the best of me in the bargain, at either of the times mentioned? A. I could not answer that.

Q. You do not know? A. No, sir.

Q. Do you think that if you personally had been making a bargain with her that she would be able to get the best of you in any kind of a bargain?

Mr. LEIGHTON: The question is objected to as irrelevant and immaterial, and not proper cross examination. I want also to speak to the record and say that I shall ask the Court to take cognizance of a great deal of irrelevant cross examination that has been put into this record, when it comes to the question of fixing who
276 shall pay the costs.

(The last previous question was read by the stenographer).

A. I could not answer that.

By Mr. McDIVITT:

Q. You mean that you do not want to answer it? A. If I could answer that I would answer it.

Q. Why cannot you answer it? A. No man can tell in making a bargain, whether he is going to get the best or not. Most parties generally think they are getting the best of the other.

Q. So that in making a bargain with Mrs. Magaw you would naturally think you were getting the best of it, or you would not go into it? A. I would not go into it to lose, and she would not have gone into it to lose. I consider her, though a very shrewd woman.

Redirect examination.

By Mr. LEIGHTON:

Q. You said in your cross examination that the deed and the codicil were designed to accomplish the same result. The deed shows upon its face that it referred to two pieces of property and the codicil to three. What explanation do you desire to make of the statement, if any?

Mr. McDIVITT: I object to the question on the ground that the witness has stated his understanding and knowledge of it, and that he has no right to explain it on re-direct examination.
277 (The last preceding question was repeated by the stenographer.)

By Mr. LEIGHTON:

Q. The deed refers to two lots that were conveyed to missionary purposes, and the codicil refers to all of the property. A. I was under the impression that the deed gave a life interest to Miss Hettie Fague, but on second thought I remember it did not. I was thinking Miss Hettie Fague had a life interest in the deed, and I remember it was only in the Will, and not in the deed.

Recross-examination.

By Mr. MCDIVITT:

At the time this deed was signed Mrs. Magaw was not blind, not that I know of. If she was I did not know it. I did not know she was blind; I did not observe that. I do not remember whether I handed her the pen when she signed the deed. I could not state whether she picked it up herself from the table; I do not know who handed it to her, or whether it was handed to her, I could not say; I do not know anything about that. I saw her sign it, I was standing beside her; I was not looking over her shoulder; I was I think, standing at the end of the table. She did not read the deed herself, I read the deed to her. I may have told her where to sign; it was my duty to have done so, if I did not. I have no recollection that I handed her the pen at that time; I may have handed her
278 the pen and showed her where to sign but I have no recollection.

Q. Is it not a fact that every time Mrs. Magaw signed a paper that somebody had to tell her just where to sign, and put the pen on the spot so that she would know where to sign? A. I could not answer that because I did not see her every time she signed a paper.

Q. Is it not a fact in this case somebody did get her started in the right place? A. If anybody did it must have been me because it was my duty as notary to see that she signed in the right place.

Q. You do not know anything about it? A. No sir.

Q. You do not know whether anybody handed her a pen and showed her where to sign? A. I could not say as to that.

Q. Will you swear that nobody did that. A. I will swear to the best of my knowledge and belief that if anybody did, it was me.

Q. Will you swear that nobody did it? A. No; because I might have done it myself.

Mrs. SARAH DOAN LA FETRA, a witness of lawful age, produced by and on behalf of the defendants, having been first duly sworn, testified as follows:

By Mr. LEIGHTON:

My full name is Mrs. Sarah Doan La Fetra. I am married.
279 My husband's name is George Henry La Fetra. I am one of the defendants in this case. I knew Alice D. Magaw in her lifetime for about ten or twelve years. I am manager of the La Fetra Hotel: Mrs. Magaw first registered there December 6th, 1901. She was not there continuously until later. I think she was there continuously about two years, between two and three years, prior

to her death, she was there continuously. She was a boarder, a guest; she paid her board. My son Edwin S. La Fetra, was the proprietor, and I was manager, and I was running the hotel for him during 1906 and 1907.

Q. Complainant in his bill states that you and Miss Amelia E. Huntley, Lydia H. Tilton, and Hettie H. Fague, intending to cheat and defraud the heirs at law of Alice D. Magaw, taking advantage of her weak condition, procured the execution of the deed described in the bill. State, if you please, all you know about the execution of that deed? A. We did nothing to secure the execution of the deed described in Complainant's bill of Complaint. The first that I knew that Mrs. Magaw was going to make a deed, she was down in my room the night before—I am quite sure it was the night before—and told me that she intended to have a deed made; that she thought to have a deed made would be more secure, and that it would be better than the will. I knew, the next morning, that Mr. Forrest was there as her agent, and she told him what she wanted done, and she had the deed prepared. I think it was Miss Lou Wilson who suggested the execution of the deed to her. She roomed across the hall from her, and was in her room a great deal. She is
connected with the register of Wills' office, and she said
280 to me that it would be safer, that there would be less doubt
about its being carried out, if in the form of a deed, rather than a will.

Q. What suggestion was made by you in respect to the deed? A. As I recollect I think I said to her it might be stronger.

Q. State all you know about the execution of it. A. I have no recollection that I was in the room at all when she told Mr. Forrest about the deed. I am a very busy woman and I was not there long at any time. I have no recollection that I was in the room. I know this. I did not know that my son had signed the deed. Whether the deed was prepared and signed at the same time, I do not know.

Q. Who sent for Mr. Forrest? A. Miss Fague, at Mrs. Magaw's request.

Q. State what you know about the execution of the codicil to the will of Mrs. Magaw, which has been testified to in this case? A. The first that I knew Mrs. Magaw had any thought of making a codicil to her will was when she sent for me to come to her room. At the time Mr. Forrest her agent was there. I went into her room. They had a will there, and she said to me; "I am going to give that property to missions." I said, "To the Metropolitan Church, Dr. Bristol, Pastor?" She said, "No, to the Women's Society." That was the first I knew. I never mentioned to her once, to make any codicil to her will. I never knew she was going to do it, until
that time when Hettie was at the hospital, she had Mr.
281 Forrest come and she wanted me to come up at the time she was going to arrange this codicil.

Q. Who was in the room at this time besides yourself and Mrs. Magaw? A. Mr. Forrest only, I think.

Q. Subsequent to that, state all you know about the execution of the codicil, and what you did yourself in connection with it—not

what people told you, but simply what you did, and your effort in respect to it. A. Mr. Forrest said to her that if she gave this property to Missions, she had better have some trustees. Mrs. Magaw said, "I will have Hettie; she is interested in missions." I said, "Mrs. Magaw, I would have with Hettie two other ladies, because it would be less care for Hettie, and I would have mentioned two other ladies with Hettie, making three trustees." She asked me who I thought would be good, and I myself suggested Mrs. Amelia Huntley and Mrs. Lydia H. Tilton, two women thoroughly reliable and accustomed to the management of property, Mrs. Tilton having been left a widow and managing her own property very successfully.

Q. Who did she mean by Hettie A. Hettie Fague.

Q. Were you present at the execution of the codicil to the will? A. I was in the day it was signed. Mrs. Magaw said at this time, "I want to give two houses to missions, and one to Hettie." Then she said, "I want to give that property to Hettie, not after her death,

282 to the Fagues; I want to give the property to Hettie for her life." I remember she distinctly said that—"not after her death; it would do her no good after her death." Then I said, "Then it would go back to the Magaws." She said, "No, I want it all to go to missions, I want it to go to missions." I said "with the same trustees" and she said, "Yes." Mr. Forrest was getting the idea how she wanted this codicil prepared, and this matter was suggested as to letting Hettie's piece of property go to the Magaw's at her death, and I said, "Mrs. Magaw, the Magaws will be more willing—Hettie will have the property during her life, and it will go to the Magaws at her death, and they would not be so apt to object to the will." Mr. Forrest was so firmly of that opinion that he wrote it out that way in the codicil first, and brought it to her and read it to her—that at Hettie's death this property should go to the Magaw family. I was in her room when he read it to her, and she said, "No, they do not need it; they do not need it." She was very positive. She said, "I want it to go to missions." Mr. Forrest said, "Now, Mrs. Magaw there is no hurry about this. You think it over. I am going to leave it," and he left it for two or three days for her to think over, and when he came she said, "No" she wanted it to go to missions. She was still firm about it and would not sign it; and then Mr. Forrest changed it and put in that it would go to the same trustees, to be used for missions, and she signed it at once, when it came back. She said that was what she wanted. The only thing I said to Mrs. Magaw was, "Mrs. Magaw, what do you want," and she told us clearly what she wanted.

Q. Were you present at the final execution of the codicil?

283 A. Yes, sir.

Q. State exactly what happened at that time? A. Mr. Forrest said he wanted some witnesses, and there were people or neighbors next to Mrs. Magaw—Mr. and Mrs. Love, who had rooms next door. I said, "Well, I will ask the Loves." Then I went to the door and asked the Loves if they would sign, and they said no, that they would not sign, because they had known trouble from wills, that they had had experience in a contested will case; and I said,

"Well, then I would not sign it." Those are the words I used—"I would not sign it then, if I felt that way." Then I said, "Miss Lewis, will you sign it?" She said, "I will," and came in and signed it without any hesitancy.

Q. Who else were witnesses to the will? A. Judge R. E. Doane, who knew Mrs. Magaw very well. Someone met him in the hall and asked him if he would sign it.

Q. Who else besides Judge Doane and Miss Lewis? A. It was Mr. Forrest, I think; yes sir.

Q. Was that all that transpired while you were there? A. All the time I was in there; yes sir.

Q. Do you know what became of the will after the codicil was executed? A. I understood Mr. Forrest took it and locked it in his safe, and it was as safe there as it had ever been, I think. I was accustomed to see Mrs. Magaw once or twice a day during the last years of her life, say from August 1905, until the time of
284 her death. She came down to her meals until June, 1906, part of the time. Sometimes I saw her at meals. She sat at our table in the public dining room. After the dining room closed in the hotel, she took her meals with us; she boarded with us and sat at our little family table until she had her meals sent to her room a little later.

Q. How long a time prior to her death was it that meals were sent to her room? A. Her meals were sent to her room off and on, sometimes for a few days; and then she would go on and steadily have her meals in her room for two or three months—I think she had them in her room for two months before she died.

Q. During that period what was her habit as to conversation, as to joining in conversation at the table? A. She was very companionable, and talked about current events. She always wanted to have the newspaper read to her, when she could not see clearly. She got the best glasses she could get, and read remarkably well, all through those last two years, until those two or three months before her death, because she had the best glasses, and had very large prints and testaments. She could read the headlines in the papers, the larger type.

Q. It was difficult for her to read small print? A. Oh, yes. She could read the headlines and get a little idea, when she could not read the other or smaller type.

Q. What, in general, was the subject of conversation be-
285 tween yourself and herself, and between others when you were present and heard the conversation? A. We had a great many mutual friends. Then things were going on at the church, and we talked of them, we talked of the services. If I went to church she would call me and want me to tell her the texts, and something about the service. Then she would want to talk about current events and missions; she would talk to me about the Bible women in foreign lands, that she was supporting, and whether we had heard from them, and if they were still doing the work. We had letters occasionally from them, and she was interested in those, and we would read them to her. She would want to know how many

these Bible women read to each day, and she was interested in missions intensely, even before she came to our house.

Q. How long did this general interest in affairs keep up? A. As long as she lived, as long as she was able to understand things, you know—that is, to be talked to. We did not weary her with telling her things when she got to where we thought she ought to sleep more.

Q. Did you know, during this latter period of her life of her attending any exercises of a general character? A. In February, 1907, she attended a parlor meeting. The parlor was well filled with ladies. We had a missionary study, and she was dressed in a pretty silk tea gown and came down and seemed to enjoy it very much. That was about the 12th of February, 1907.

Q. What was the character of the exercises? A. These ex-
286 ercises were a study of the islands and the missions in the various islands of the sea. We had map exercises. Then we had talks from missionaries afterwards, some missionaries who were there with us.

Q. Who conducted the exercises? A. Mrs. J. N. Holmes, was Chairman; and then she had different ladies—she had Mrs. Tilton give a map talk, and other ladies gave talks on various phases of the work.

Q. Do you recollect whether or not Mrs. Magaw participated at all in any of the conversation? A. Oh, yes; she met the ladies and knew them and talked with them and seemed to enjoy the service very much—that is, in her happy way, as much as you would judge anyone who showed interest. She listened and seemed to be delighted with the exercise. We had no other thought than that she was participating in these exercises as we were ourselves.

Q. Was there any other public or general social occasion in your house after that, to which she was a party? Do you recollect? A. I am not positive. Sometimes she had little social times in her room with other ladies. The occasion I have mentioned is the latest, I think, in the parlor.

Q. State whether or not you ever read to her? A. Very little. I occasionally read some missionary letter that I had received from her Bible women, but I had very little time, and did not read to her much myself. My husband read to her a great deal in the evenings. He read to her all that year until about June.

Q. You are speaking of what year? A. 1907. He was a very distinct reader.

287 Q. Where did he usually read to her? A. In her room. She used to come down to the little sitting room with us in the evenings, and he went to her there often, and then after that he read to her in her room sometimes.

Q. What was the character of the reading; what was it? A. General news in the Star, the daily papers. Sometimes it would be some book some religious book. She would like that. Then he used to sing to her. My husband is not a solo singer, but she liked to have him sing hymns to her, and she always hummed the hymns with him. This continued until two months before her death.

(Witness was shown complainant's exhibit Numbered 42, in lead pencil, and asked to state in whose handwriting the body of the check was.)

That is the handwriting of my son, Mr. E. S. La Fetra. I know about that check. It purports on the margin to be given to missions. She gave that to the Women's Foreign Missionary Society in 1906. I think probably she gave it to me, because I represent the Missionary Society. I think probably after she had signed it, it was given to me; and I may have taken it down to the Treasurer myself. I did not see her when she signed it. It was dated August 16th, 1906. She often told me she wanted to give as much as she could. She had been giving every year, since 1901, especially. She supported two Bible women in foreign lands and always gave to the general work as liberally as she could. The checks the com-
288 plainant has offered in evidence payable to the order of E. S. La Fetra were given in payment for board, for the board of Mrs. Magaw and her nurse, and for the salary of her nurse; and for cash purchases made for her clothing, and other things, for which cash was advanced to her, instead of having her draw a little money when she wanted it. Mr. Van Brunt Magaw told me when he was down here to let his mother have what money she wanted for such things, and let her pay by check all at once. That accounts for the difference in the amounts. Also those checks covered board for her granddaughter, and for her son and his wife and people who had been there that she had entertained. She had had a maid in other years. Mrs. Magaw was never there alone, I think, hardly. When she came first she had a companion with her and she had her room and board to pay. Those checks were presented either by myself or my son to Mrs. Magaw. After he went away I presented the bills to her. An itemized bill accompanied the checks which was receipted and put in and given to Mrs. Magaw. That was the custom in respect to each of the checks that were drawn in that way except for missions.

Q. What was Mrs. Magaw's habit in respect to the examination of the accounts before she signed the checks? A. She would read it herself, and then when her eyes got bad, she asked me to read it to her, and I would do so. The handwriting on the body of the check Exhibit numbered in lead pencil No. 8 is mine. I wrote that; on the margin, it specifies it is for taxes. That is endorsed by E. G. Davis, Collector of Texas. Mrs. Magaw wanted this filled out. It was taxes upon her own property. I do not know anything
289 about the payment of the bill except that it was sent in. Besides these regular board and nurse affairs, there were some purchases made for Mrs. Magaw, in which she was interested. There was one cloak that she bought. She asked me to go with her and we went over to Woodward & Lothrop's and she got the material for a long circular cape. She had a friend who had gotten a new cloak and she thought she needed one. That was in the winter of 1905, and I went with Mrs. Magaw and she selected the material for it, and the lining. We got it at Woodward & Lothrop's. And then she wanted Steinmetz to make it up. She had it trimmed in black

marten fur. The cloak was made by Steinmetz. Referring to check marked No. 51, under date of January 20, drawn to B. H. Steinmetz & Sons; that is the check Mrs. Magaw paid Steinmetz, in payment for the black marten fur collar and trimmings to make up the cape. She was particular about the material. She knew what she wanted. Referring to the difference in the powers of speech or her capacity to express herself, between the time she was first taken ill and her death, sometimes she was very much better. Sometimes she scarcely made a mistake at all in her conversation. At other times she would use a word or two that would not be right.

Q. How did her condition, after she was taken sick in 1905, compare with her condition in the year 1907; that is, the last year of her life? A. The early part of 1907 she was better. Toward the last she was weak physically, but I do not think her powers of speech were any worse. She never recovered her entire speech. I
290 suppose her capacity to express herself was at its worst, soon after the stroke. I was not at home when she had that, and she was better when I got back than she had been. It was about a week or ten days after she was taken before I returned home. She almost universally knew when she misused a word and where it was—"Oh, I cannot get that word, I cannot get it. Why don't he get it for me?" She would mean Dr. Custis. The effect of her miscalling words rather fretted her and annoyed her. When she was eating fish she got so she would use her fingers, because she wanted to get the bones out. She used her fingers occasionally. She regretted it very much and she would not come to the table sometimes, but would have her meals in her room, because it annoyed her to have people see she was not so neat in her eating, as if she could have seen.

Q. Why did she use her fingers for eating, do you know? A. I always thought she used her fingers because she could not see, she could not see so well. She could not see to cut the meat so well. She liked to feed herself. She never did have anyone feed her, for she liked to do it herself. Her eyesight grew rather bad. Her eyes, one of them, was affected with a cataract, I think; but the other one was strong, though it got weaker, so that she could not read. I do not remember exactly the date when her eyes were affected. She came from New York to go to an oculist, right in the middle of the summer, because she became uneasy about her eyes. I do not remember exactly the date. I would have to ask Dr. King. She was going to him all that summer, going twice a week. It
291 may have been in 1904. She thought her eyes improved under Dr. King, for quite a while and then he told her he could not do anything more for her. It was her age, and he could not do anything more for her eyes. She could see at a distance better than she could see objects close to her. She could on the street better than she could read. The size of the print had a great deal to do with her capacity to read. She had a magnifying glass. She could read good print for a year after she could not read fine print. I never heard Mrs. Magaw use profane or indecent language. From my business relations with her, and my social relations, I think she was thoroughly competent to make a valid deed or contract.

Referring to what Mr. Van Brunt Magaw testified about my disposing of some article of personal property or furniture that belonged to the decedent, after her death, I never did dispose of anything of hers. She had a bedstead, a mattress, a spring, and a little book rack, and a commode. Those things belonged to her, and she gave them to Mrs. Taskar. I think as much as a year before she died she said, "These are to be yours when I am gone", speaking to Mrs. Taskar. Mrs. Taskar is a dear friend of Mrs. Magaw, Mrs. J. C. Taskar, a lady who has been a friend of Mrs. Magaw for many years, and who was in the Methodist Deaconess Home. She wanted these to go there to be of use in the Deaconess Home. As I understand it, she gave these things to Mrs. Taskar personally, but for use in the Deaconess Home. I did not have any trouble with Miss Bertie Lewis, except that I discharged her. She was there as an employee
292 and I found she was not profitable to me or to the house, and I told her that her services were no longer needed. I preferred to be alone with my husband, after we intended to give up keeping house. I wrote to her after she left—I do not know what is meant by "trouble". I have had trouble, but as to Miss Lewis, I lost all confidence in her. There is one thing that you might say was trouble, although I did not consider it so because it is no trouble to discharge a woman I did not need or did not want. I do not see why I should call it trouble. It is a word I do not understand in this connection. I discharged her because she was unprofitable. I found it was of no benefit to me to have her. During the stay of Mrs. Magaw at my house, Mrs. Magaw gave me a book. It is "The Shepherd's Psalm", by B. F. Meyer. It is illustrated. It was a Christmas present in 1901, and one day we were out driving and I took her out in my own carriage, or my son's and we stopped at the market and I bought a rubber plant, a little rubber plant that I wanted to take home. Mrs. Magaw said, "I will pay for it". It was fifty cents. I said, Mrs. Magaw, that is a nice little present, and I appreciate it". She gave me that and gave me the book, "The Shepherd's Psalm". I was going to bring it with me today. I am very fond of it. On my last birthday, before Mrs. Magaw died, she had Hettie get a bunch of red roses for me, the 11th of June, 1907. They were beautiful; about a dozen red roses. Those presents that I have mentioned were the only ones I ever received from Mrs. Magaw. I think I had something to do with Mrs. Magaw's changing her agency. Mrs. Magaw had heard the house was vacant. I am not
293 certain how she heard that one of the houses was vacant, but she asked Hettie and I to go up and see the house. We went up and looked through the house and Hettie went down, I think, to Mr. Banes and said she wanted to see one of the houses and Mr. Banes told her she could get the key next door. We went up there to the house, and found it in a very dirty condition, in a very bad condition. I remember there was a great stack of ashes in the back yard, and the paper was very badly soiled and torn. The house was in bad condition. It was not fit for a tenant. Then Mrs. Magaw sent for Mr. Banes to come and see her. I saw him when he came and spoke to him. He spoke to me about it and I told him that I had seen the house. He saw me at the door. It was very

late, nearly night, when he was there. He spoke to me at the door and I told him that Mrs. Magaw had asked me to go down and see the house and that it was in bad condition. He said, "No; it only needs repairs on the furnace or the latrobe; otherwise it is all right." He said it was rented then. I said "You know Mr. Banes there is a great deal more to be done than that." He said, "I am building two hundred thousand dollars' worth of houses in the neighborhood, and I guess I am able to take care of that." I said, "Mr. Banes, you are too busy to look after little affairs like that, and I think the house is not in condition to rent to a good tenant." There was the smell of liquor on his breath then. I do not think he was in condition to be careful, and I wrote to Mr. Van Brunt Magaw about it. He has my letter I should think. I am not sure whether Mr. Banes himself saw Mrs. Magaw or not in respect to the change of agency.

294 Mr. Banes never had an interview with Mrs. Magaw in my presence. If he saw her it was not in my presence. Referring to the fact that Mr. Banes says in his evidence that Mrs. Magaw could not talk business at all, I say she could. She did not always get the word, but she knew what she was talking about.

Cross-examination.

By Mr. McDivitt:

Miss Lou Wilson whom I mentioned as having suggested the giving of a deed to confirm the codicil, is a member of both the women's missionary societies of the Metropolitan Church. I heard Mr. Forrest testify this morning. I have attended all of the hearings which have been held in Washington in this matter. I believe that what Mr. Forrest said about Mr-. Magaw's way of talking is true. On my direct examination I was questioned as to Mr. Banes' statement that Mrs. Magaw could not talk business at all, and I stated that she had difficulty to get the right word, but that she knew what she was doing. I think it is true that those who were familiar with Mrs. Magaw could understand her better than a stranger could. I expect that Mr. Banes did not see Mrs. Magaw very frequently, I do not knew. When Mrs. Magaw was signing the codicil, she did not use that strong magnifying glass that I mentioned. I was not there when the deed was signed.

Q. When you first saw Mrs. Magaw after her first stroke you thought she was a pretty sick woman, didn't you? A. She was better. I think she was sitting up when I got home.

295 Q. She was rather feeble? A. She was not as well as she had been when I went away.

Q. Well, she had had a stroke. She was not anything like herself, she was not anything like as well, was she? A. That stroke did not keep her confined to her bed long. She rallied very soon.

Q. You had some doubt about the desirability of her remaining with you, as a boarder, did you not, about that time? A. No, I guess not.

Q. You never did? A. She was capable of doing as she wished to do.

Q. I did not ask that. Was there not some doubt in your mind about the advisability to keeping her as a boarder after she was taken sick? A. No, sir; not that I have any recollection of now.

Q. You thought it would be a good thing to have some guardian appointed for her, did you not? A. Mr. Van Brunt Magaw——

Q. No. Did you not think that? A. I never thought she was an imbecile, no.

Q. I did not say that, but you thought it was a good thing to have a guardian appointed for her? A. No, I do not say that I did.

Q. You never thought so? A. I would not have objected if there had been; it would have relieved me, but I never said she must or that she must go.

Q. You never said she must go? A. No, or have a guardian appointed.

296 Q. Did not you and Mr. Van Brunt Magaw have a talk about having a guardian appointed for her? A. Mr. Van Brunt Magaw was down one time——

Q. No. Did not you have a talk with him some time? A. I thought he himself wished to take the responsibility——

Q. What do you mean? A. Take the care of his mother, as every son should.

Q. To have him appointed a guardian, do you mean? A. To take care of her money affairs—that would relieve me—simply as a son would generally do if necessary, for his mother.

Q. You do not mean you talked with him with reference to having any guardian appointed by the Court? A. No, indeed. I asked him if he thought best, that he should take the responsibility. He said he would not without consulting a lawyer. He asked for the name of some good lawyer, and I told him, "Mr. B. F. Leighton." He went to see Mr. Leighton. He said he always liked to consult a lawyer. Mr. Leighton, however, was not in town and I referred him to Mr. John B. Larner, one of our best lawyers. He went to him and he advised that unless his mother was incompetent to attend to business, to leave it as it was. That was the last of any talk about the appointment of anything.

Q. You had a conversation with Mr. Van Brunt Magaw, did you not, about his becoming the guardian of his mother? A. Well, whether you call it guardian or whether he was simply to look

297 after her—I never used the word, "Guardian," or never thought of his being a guardian of his mother.

Q. You never did? A. No, sir.

Q. Is it not a fact that you told Mr. Magaw about this time that if he personally did not become responsible for his mother's board that she could not remain there? A. Never.

Q. You never said that? A. I never did.

Q. Is your memory good? A. Generally.

Q. Is it good now? A. I think so. That would have been very disrespectful to Mrs. Magaw, and I never said anything like that.

Q. Do you mean to swear, Mrs. La Fetra, that in the dining room, shortly after Mrs. Magaw was taken sick, within a few weeks, that you did not say to Mr. Van Brunt Magaw that unless he became

personally responsible for her board bill that she could not remain? A. I do say that I did not say it.

Q. And at the same time you emphasized it by striking the table with your hand? A. I have no recollection of doing any such thing.

Q. And it never occurred to you, from any suggestion that Mr. Magaw made, that he intended to have a guardian appointed for his mother? A. No. He said he did not intend to do anything as long as she continued as she was.

298 Q. I mean before you gave letters of introduction to two lawyers did not he say something to you about having a guardian appointed, and that it was necessary to see a lawyer about having a guardian appointed? A. I said to him, "Mr. Magaw, if you could take the responsibility of your mother it would relieve me from looking after everything," and he said he would not do it unless he consulted a lawyer. That is all there was in it. I did not give letters of introduction; I simply gave him Mr. Leighton's name and address.

Q. You did not give any letter of introduction? A. No, I think not. I do not remember that I wrote a letter of introduction. On a Tuesday after Mrs. Magaw's death, Mrs. Taskar sent a man with a wagon, and he took Mrs. Magaw's personal effects to the Deaconess Home. Hettie notified her that she could send for them any time. They belonged to Mrs. Taskar, because Mrs. Magaw had given them to her for the Deaconess Home. I knew they had been removed from her room.

Q. Did you see them going out? A. They were not mine. I had no right to them.

Q. Had they ever been removed from the room before, during Mrs. Magaw's lifetime? A. No, I think not. She used them.

Q. Do you not know that by removing those goods, after the death of Mrs. Magaw, you were acting as an administrator, without right? A. Mrs. Van Brunt Magaw had taken her things. Everything was decided with Hettie before Mrs. Van Brunt went

299 away. She looked over the clothing, and Mrs. Van Brunt disposed of it; I did not.

Q. I refer to the time Mrs. Van Brunt Magaw came down? A. But she was only there at the funeral.

Q. The Magaws were not there at her death? A. Oh, yes they were. Clara, the daughter was there when Mrs. Magaw died. Mr. Van Brunt Magaw had gone home Friday night, and Mrs. Magaw died early Saturday morning. Mrs. Van Brunt Magaw came later in the day. When I sent the telegram announcing the death of Mrs. Magaw, Mrs. Van Brunt was on her way to Washington, but she was not there when she died.

Mr. JACKSON: Counsel for the complainant, in response to a notice to produce, served upon himself and Francis C. McDivitt, whose true name is Francis S. McDivitt, the response to which was to be made the 6th day of November, A. D. 1908, in accordance with the terms therein set forth, state as follows:

(1) Counsel decline to furnish any letter or letters written by

Van Brunt Magaw, for the reason that Van Brunt Magaw is not a complainant in this case and counsel against whom said notice is directed appear of record as counsel only for the complainant, Mr. Robert Magaw. In further response to said notice, counsel suggests that any letters in the possession of Van Brunt Magaw, which may be relevant to the issues in this cause, are beyond the control and possession of counsel for the complainant, and further that these letters, if they exist, may be had by directing process in such case provided against Van Brunt Magaw.

300 In response to request for letters written by Francis C. McDivitt, whose true name is Francis S. McDivitt, written by said McDivitt to Alice D. Magaw deceased, counsel decline to furnish such letters, because they are not in possession of Francis S. McDivitt, the said letters being as counsel supposed among the personal effects of Alice D. Magaw, if not destroyed, with respect to which counsel have no information. So far as this notice calls for copies of any such letters counsel decline to furnish the same until a sufficient foundation is laid for the production of secondary evidence. The above response also constitutes a reason for failure of counsel to furnish any letters written by the deceased to Van Brunt Magaw. As to any letters received from the aforesaid deceased by Francis S. McDivitt, counsel say that Francis S. McDivitt has not been able thus far to find any letters written by the deceased during the period set forth in paragraph — of the notice to produce. Francis S. McDivitt is of the impression, however, that he may have one or two letters written to him during this period, and says that he will furnish the same in the course of two or three days to defendant's counsel, provided he is able to find the same with respect to which he will advise defendant's counsel. More specifically Francis S. McDivitt wishes to say that he received no letters from the deceased after her stroke of paralysis in August, 1905, and that the one or two letters that he might have received, above referred to as his impression were received, if at all, prior to the stroke in August, 1905.

(2) Counsel say as to the call for the production of the
301 document therein set forth that the same is not in their possession or control and that they have no knowledge whatsoever as to its present existence or whereabouts.

(3) As to the letters or letters referred to in paragraph 3 of said notice to produce, Francis S. McDivitt says that he has never written to Dr. George W. N. Custis of the City of Washington, District of Columbia, any letter whatsoever and he is therefore unable to produce such a letter.

Francis S. McDivitt also says that he has never received a reply from the aforesaid Dr. Custis to the above letter for the reason that no such letter was ever written by him, and said counsel further says that he has never received any letter whatsoever from the aforesaid Dr. Custis.

EDWIN S. LA FETRA, a witness of lawful age, called by and on behalf of the defendants, after being first duly sworn, testified as follows:

By Mr. LEIGHTON:

My full name is Edwin S. La Fetra. I am Treasurer of the Spanish Trading Company, and have resided at East Orange, New Jersey, since June, 1907. Up to that time I was in Washington. I am the son of Mrs. La Fetra, one of the defendants in this case. I was the proprietor of the La Fetra Hotel during the summer of 1905, from the fall of 1905 up to August of the year 1907. I knew Mrs. Alice D. Magaw. She was an inmate of the house. I recollect she was there several years, I would say; I do not know how long.
302 She was there at the time of her death. She was there pretty nearly continuously from 1905 until her death.

(Witness shown defendant's exhibit No. 1 and asked if that is his signature, as a witness to the deed).

It is my signature. At the time the deed was executed Mrs. Magaw, Mr. Forrest, and myself were in the room. I am not sure that anyone else was there. I do not recall that anyone else was there. I was asked to become a witness to the deed but by whom I do not recall; I think Mr. Forrest asked me. As I recall, Mr. Forrest read the deed to her in my hearing, and in hers, and questioned her in regard to it, so as to make sure that she understood. I was glad that he did so, because I was glad to see myself that she did understand it, and I believed thoroughly that she did, before I witnessed it. I knew I was to be a witness and I felt probably that was one of the things I should witness, whether she knew what she was doing, because she could not speak very clearly and so she could not say as directly as another person might that she did understand every word of it, and had to make it known in her own way. It purports to be signed by Alice D. Magaw, she wrote the signature in my presence.

Q. Did you know anything about the deed prior to its execution, prior to your being called upon as a witness, that it was to be executed or anything? A. I think I had heard that she was going to execute such a deed.

Q. Did you know anything about her executing a codicil
303 to her will, personally, I mean? A. I was not present.

Q. Did she consult with you about it in any way? A. She did not.

Q. Did she consult with you about the making of this deed? A. She did not.

Q. How frequently were you accustomed to seeing Mrs. Magaw? A. Sometimes it would be within every day or two and other times it would be probably a week or two before I would see her. When it was her custom to come downstairs I would see her, I think every day, because I was around the dining room and the office and the hotel generally. But when she became confined to her room, then it was less frequently. I would go in sometimes, hoping to cheer her up, and to make it pleasant for her.

Q. Did you have any other business relations with her except that of the execution of this deed, during the time she was ill? A. I was the proprietor of the hotel. I made out bills for her to settle, which covered not only board, but other items, as the amounts had been advanced to her companion and for medicines and for clothing and various things. We simply put them all on the board bill. The clerk would make the bill out and sometimes I have gone up with the bill myself and presented it and she has looked over it and acquies-ed in it and signed a check for me, and told me to fill in the check. Sometimes that bill has been taken up by someone else,
and I have filled in the check in a similar way. Whenever
304 checks were presented by myself they were accompanied by
an itemized bill showing for what the checks were given. I recall the time when Mrs. Magaw was first taken ill, her speech was more confused in the beginning than it was a little later. It differed as to the loss or misuse of words, at different times during her illness, sometimes she seemed to be getting along so much better and thought that possibly she was improving. At the time this deed was executed she could speak some words plainly, but could not speak a whole sentence plainly. She would become confused somewhere in the sentence and would miss the correct word. Sometimes she would use another word than the one she wanted. She seemed to be conscious of the misuse of language. She showed that she had gotten the wrong word, which irritated her, namely that she could not get the right word that she wanted to use.

Q. From your relations with her, what do you say as to her capacity to make a valid deed or contract at the time this deed was executed?

Mr. McDivitt: I want to object to that on the ground that this witness is not competent to give an opinion, for the reason that he has not qualified, in view of the fact of his not having sufficient knowledge of the deceased.

A. I think that she was competent. I think she understood what she was about when she gave this deed.

Cross-examination.

By Mr. McDivitt:

Q. What was the trouble with her speech? *Q.* She would start
in a sentence and get the wrong word after a bit. I recall
305 especially one word, the word "promise." She would say
things were "promise." If she wanted a thing she called it "promise," and it might be she was wanting her companion, or it might be she wanted something in the way of eating or something else, and that word would come up.

Q. So that in using that word she might have meant one thing or meant another, meaning different things at different times? A. She did mean one thing and did mean another.

Q. She did not mean the same thing? A. No.

Q. Was there any other word you remember she used except

"promise"? A. That is the only one that is fixed plainly in my mind. I think there were some others, but I do not recall them.

Q. When you were called in as a witness, you felt she ought to show she understood what she was doing, in order that you should be an intelligent witness to the transaction, did you not? A. I did. I personally did nothing to find out that she did know what she was about, except to listen to the conversation between herself and Mr. Forrest, who read the deed to her. I felt in my own mind that I should be convinced that she did know what she was about. If I had made up my mind that she did not know I would have refused to have signed it.

Q. Did you go there with that intention in your mind? A. To sign it.

306 Q. No, to refuse to sign it if you found that she did not know what she was doing? A. I cannot say that I did. I simply went in to sign the deed if she understood it. I went there with the expressed intention to sign it in case she understood it. You might take the converse as true. I did not presume it was so. I say it is on account of this difficulty in speech that I felt this was necessary. I knew in other things—I felt sure she understood what she was about.

In signing the deed she did not use a magnifying glass to see with. I do not recall in this instance whether anyone pointed out to her on the paper where to sign. Frequently we did have to point out. I did on a check, for instance; I do not recall who handed her the pen she used. The only ones I can remember who were present are Mr. Forrest, Mrs. Magaw and myself. I believe someone else was there. I have a feeling that possibly someone else was there, but I do not recall who it was; it was not my mother. I did not have anything to do with Mrs. Magaw's execution of the deed, except to see it done. I heard it read in her presence and whatever else was done, was done by Mr. Forrest, he read it, he read the deed to her. I did not recall just who had drawn up the deed, but with this refreshing of my memory, I believe he was the one. Now that you speak of it I think he was the one who asked me to be a witness. I do not know whether Mr. Forrest handed her the pen or not, or whether she picked it up herself. It was common, in having her sign checks, or any other papers to point out where to sign at any rate, and sometimes put the pen at the place where she

307 could start; sometimes she was clearly able to do it herself, to strike the right place herself, by feeling, and would be able to see a little better. Sometimes her vision was considerably clearer than at other times, she would feel with her hand where to put them on the check, back where the line would be. She would know where the line would be, and then, too, I think her vision was more clear at times than others, and she could see clearly enough to be able to tell where to write. I think her vision was dim at the time of the signing of this deed. She was not able to read. I had heard of the fact that the codicil had been made, I think my mother told me about it.

JOHN E. MITCHELL, a witness of lawful age called by and on behalf of the defendants, after having been first duly sworn, testified as follows:

By Mr. LEIGHTON:

My name is John E. Mitchell: my occupation is the real estate business, commissioner of deeds and notary public. I am a commissioner of deeds in many states, including the state of New York. I knew Alice D. Magaw in her lifetime, I should say nearly twenty years; I had business with her during the last years of her life; I did not know that she was ever seriously ill, no, sir. I saw her in the year 1907; I should say about three times in 1907; the last time was several months before I read of her death; I fix the other times just in a general way—that there were periods of a couple of
308 times before that, say of a few months. I saw her in connection with the acknowledgment of papers for New York; generally they were releases of dower rights. This last time that I called to see her was of that character, to the best of my recollection. I did not take the deed to her that she was to acknowledge. She had it when I was there. Miss Fague, I think came to get me, I got the message at the office, and my recollection was that they told me Miss Fague had called. The last time I was there when I went in she greeted me in her usual way. She was generally bright. Miss Fague got out the instrument and we generally went over the question of what the instrument was, and that was no exception. We did the same thing. Miss Fague started to tell her where she should sign it and she told her not to get nervous. That just has the effect of making her get nervous. Then Mrs. La Fetra and Miss Fague tried to put her back in her usual condition. I said, "Just wait until you get settled down." She said, "If you insist upon showing me I will get nervous over it. Just let me do it myself." So we waited a few minutes, and finally she quieted down and got in her usual easy way, and signed the paper. But the question was brought to my mind that made me think she was not as well as usual. It came to my mind from some expressions she used, that she was not in her usual good shape. In going over the paper she said, "Well, I guess it is for my "service." I took that to mean or presumed it meant, for her dower, but she did not use the word at all. An explanation was made of the paper she executed at that time; everytime
309 I took one, we would go over the situation; by that I mean, Mrs. Magaw and myself.

Q. Did she or not comprehend the nature of the instrument?

Mr. MCDIVITT: I object to that question on the ground that this witness is entirely incompetent and disqualified to give an opinion as to the competency of Mrs. Magaw.

The WITNESS: I am confident she did.

The instrument was not exactly an instrument having title to real property, as I remember it, it was in relation to funds that represented a dower interest in the proceeds of sale of real estate—that is, this particular instrument. For instance, the property had

been sold, and the funds in hand, and this was a release of these funds. I do not recollect to whom, I think it was to Van Brunt Magaw, but I am not certain. I cannot state what was the amount of the fund, I cannot remember. I cannot fix with any accuracy the date, any nearer than I have; it was several months prior to her death, but I am not sure of the date. To the best of my recollection I was there twice before that in 1907. By judging the distances apart from the time I was there, looking back and judging those distances, the occasions of those visits were releases of dower in New York property. I do not recollect to whom those releases were made, or any of them; I would not have the memorandum now. At the time I had them of course, but I do not remember them now. I took the acknowledgment of the instrument as a commissioner of deeds for New York; I am a notary. I could not state how many times I saw her from 1905 up to the time of her death. I did not have any social or friendly relations with her outside of her
310 business relations. I never went there except on matters of business, and the business I transacted related to my official position, except say, during the five or six visits previous to that. Previous to that it related to real estate business. My early connection with her was in regard to real estate. But latterly I was there in respect to taking acknowledgments of deeds or instruments of writing. Mrs. Magaw's capacity for attending to business was generally this—the papers that I would take would be from an attorney; she usually had them from an attorney in New York; I do not recollect the name of the attorney. I would say that her son recommended that such action be taken as he suggested in certain things, and she would generally wind up with, "Oh, well, I guess it is all right, anyhow." She would do that in almost every case. We would go over the case and she would say, "Oh, I guess it is all right anyhow," and that is the way we would wind up, and then she would sign the paper and acknowledge it.

Q. Do you understand what she desired to say at the time this instrument was acknowledged?

Mr. McDivitt: I object to that, on the ground that it calls for a conclusion of the witness' mind.

A. She said all that she wanted to say, so far as I know. The only time I ever noticed any impediment in her speech was the last time I was there, and that is what made me take notice. Previous to that I never had observed any impediment in her speech.

Cross-examination.

311 By Mr. McDivitt:

Q. In listening to her conversation this last time that you saw her, a few months before her death, you would not say that it was absolutely certain that you could tell just what she meant from what she said, would you? A. Well, I did not have much conversation with her.

Q. Referring to the occasion you speak of a few months before her death, when you saw her, you would not say relying entirely upon

what she said, that you were able to understand what she meant, invariably? A. I was able to understand what she meant.

Q. Invariably? A. There is no occasion for invariably; what do you mean?

Q. Perhaps my question is involved a little. Do you mean to swear before this Court that you were able to tell with absolute certainty what she meant when she used the word "service." A. That I knew what she meant?

Q. Yes. A. No.

Q. You could guess at it? A. Yes, sir, that is right.

Q. Did she talk quite a good deal while you were there? A. Very little.

Q. Did she seem rather feeble? A. She seemed more feeble than I had seen her—not physically.

Q. Mentally? A. Yes sir.

312 Q. You noticed that she was perceptibly weaker mentally than you had seen her before? A. She was just as bright mentally.

Q. Will you answer my question?

Mr. LEIGHTON: He is answering; let him complete his answer.

(The following question was repeated by the stenographer:) "Q. You noticed that she was perceptibly weaker mentally than you had seen her before?"

A. No.

By Mr. McDIVITT:

Q. You just stated that you did? A. No, I did not, not mentally.

Q. Not mentally? A. I did not say she was weaker mentally. If I did I did not intend to say it.

Q. You meant to say she was weaker physically, not mentally? A. Yes sir.

Q. Then you have simply reversed what you meant to say? A. Yes, sir.

She used this word "service" a number of times; there was no other word she used out of place. I said that when I went there Miss Fague in her anxiety to keep her from getting nervous did make her a little nervous, and got her upset; and that in going over the matter she said she supposed this was for her "service". I said nothing about her being unable to make a sentence without using

313 a queer word. Referring to the last time I saw her I can only say it was a few months before I read of her death; I do not know when she died. If you say she died on the 10th of August, 1907, I should say two months to three months. That would bring it right about the 1st of May, somewhere around there.

Q. Did you examine her to see how much she knew about the transaction? A. I went over the instrument with her as I always did.

Q. What do you mean by going over it? A. I read over the points of the instrument.

Q. Did she read it over? A. No.

Q. Did she talk about it? A. She asked me the nature of it.
Q. She asked you the nature of it? A. Yes, sir.
Q. Did she know the nature of it? A. I could not say.
Q. Did you tell her the nature of it? A. Yes sir.
Q. Did you read it over to her besides? A. Every word.
Q. Yes. A. No.
Q. Why not? A. I never heard of such a thing.
Q. You never heard of reading a legal paper over in full? Q. Every word?

314 Q. Yes. A. Not in cases where you are used to going and taking acknowledgments of people, no. As I said, I explained the nature of the paper to her, and what it was.

Q. What did she say about it? Did she say she guessed it was all right? A. Yes, sir, she said she guessed it was all right.

Q. Did she use those very words? A. I could not say as to these very words. That is what she always said previously.

Q. But she was in a different condition, now, and I want to know what she said now. A. You mean to get every word precisely?

Q. Yes. A. Well, I could not say that, other than she guessed it was all right.

Q. She said she guessed it was all right? A. Words to that effect.

Q. Did not she help out her speech with some nod of her head, or movement of her hand? A. No.

Q. But you cannot remember the exact words she said? A. They may be the exact words.

Q. They may be? A. Yes sir.

Q. But you do not know whether they are? A. No, I could not say, of course not.

Q. Why did you talk to her about it? A. Because I always did, in every paper.

315 Q. You did not know that she trusted to her attorney in New York? A. I know she relied on him a great deal.

Q. Do you think she relied on you to catch any error that she might make? A. No, because she was always satisfied, as I say, and that she guessed it was all right anyhow.

Q. Then you did not have very much conversation while you were with her? A. No.

Q. Was Mrs. La Fetra present? A. Yes, sir.

Q. Did she talk? A. She talked a little.

Q. How did Mrs. Magaw exhibit her nervousness that you speak of? A. She simply said, "Now, don't make me nervous."

Q. Did she say it in those words? A. The exact words?

Q. Yes. A. I could not tell you now.

Q. Do you remember whether she used the word, "nervous" or "nervousness"? A. Yes, sir, she used the word "nervous".

Q. In what way did she use it? A. As I stated.

Q. You say those were not the exact words?

Mr. LEIGHTON: He did not say they were not the exact words. He said he did not remember.

316 The WITNESS: You asked me in what way she used the words.

By Mr. McDIVITT:

Q. I asked you in what way did she exhibit her nervousness? A. By telling them not to make her nervous

Q. But you did not know what words she used in making that expression? A. I could not say the exact words, no.

Q. After you had explained the paper to her, did she repeat any of the contents of the paper? A. No.

Q. And the only way you know she understood the contents of the paper was that she assented, and said it was all right? A. As much as anyone can tell from any human being that they know that they are satisfied it was all right.

Q. You are not answering that question at all. I asked you whether or not it is not a fact that the only way you could tell she understood the contents of the paper, after you had explained it to her, was by her assenting to it and saying she guessed it was all right. A. I should say that was the way, yes sir.

Q. That was the only way? A. I do not know of any other way by which you could understand it.

Mrs. PAUL WAGNER, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, tes-
317 tified as follows:

By Mr. LEIGHTON:

My full name is Leora Wagner. I am married; my husband's name is Paul; I live at the La Fetra Hotel; the last time I have been there since about the 15th of June; I came there in June, 1908. We left there in February, 1907, and at that time we lived there a year and a half; we were there a year and a half prior to February, 1907. Referring to complainant's bill shown me, I am more acquainted with Hettie Fague than the others. I know the other ladies; I never met Robert Magaw, I have met the granddaughter, and I think I have seen the father and mother there, but do not believe I have ever been introduced to the mother. I have seen the granddaughter several times. I knew Mrs. Alice D. Magaw in her lifetime; I knew her for about two years. The last two years of her life she had No. 44 on the fourth floor, and I had No. 48 on the same floor. The last year and a half of her life I saw her sometimes two or three times a day, and sometimes only once a day. I was a trained nurse for nine years before my marriage. The subjects of my conversation when I called upon Mrs. Magaw were general subjects, principally. She would often tell me of her condition and about her sickness, and things like that. Our subjects were mostly general, about everything in general, nothing special. Sometimes she would mention church work, and things like that to me. She did not discuss, or say anything to me about her family, or about business matters; she said nothing about her money or

business matters. She talked to me a little about her son
318 and her son's wife and her granddaughter. I am not a member of the Metropolitan Church: I am a member of Foundry Church; I did not know anything about the execution of the deed or codicil to her will; she never spoke of those subjects to me; she never spoke of her money matters or her will or anything like that to me. I do not know exactly what was the physical condition of Mrs. Magaw during this period that I have spoken of; I was not there when she was taken sick. About all I know is what she told me herself. Of course I saw her every day; There were some days when she seemed to be a little worse than others, but most generally she was able to talk and tell me anything she wanted to. I understood everything she said. She seemed to me to be well; I think once or twice she was in her bed two or three days, but I think most of the time she was able to be up all day; she had an attendant with her, a nurse; she had a lady taking care of her most of the time. That is, she was in the room; she was more of a companion. I think it was the habit of Mrs. Magaw to take her meals at the table, at the common table with other people. For the first year and a half, or a year anyway, she took her meals from down at the restaurant most of the time; I have sat at the table with her; we did not have the same table, however. I considered her a very bright and refined woman. During the time or period that I knew her she did not in my presence use any profane, indecent or coarse language. I considered she had very refined manners at the table; these manners did not change at all while I was there not that I saw. At
times there were words she could not articulate properly.
319 She knew what she wanted to say, but sometimes she could not say the word just at the time she wanted to use it. She knew very well what she wanted to use and most of the time I could understand every word. It was very seldom but what I could know just what she was trying to tell me, all the time. Some days it would seem as if she had no trouble at all, hardly, in talking. On others she would have a little more difficulty. She was conscious of her misappropriation of words; she knew when she had not used the right word; she would sometimes say, "Oh, that is not the word I wanted to use." And I knew her so well that I would tell her the word, and if I did not happen to say the right word, she would say, "That is not the word I wanted; say something else." And if I should happen to supply the word she wanted, she would say, "Yes, that is what I wanted to say". If I have ever read to her it has been very little. I do not recall anything that I have ever read to her. I saw her during the last year of my stay almost once a week; I think she was perfectly capable of making a will, and letting anyone know what she wanted stated in the will. She had a very strong will.

Cross-examination.

By Mr. McDivitt:

I knew Mrs. Magaw very well; I talked with her a great many times; so that I felt absolutely sure that I understood her meaning in whatever she tried to convey. I said I was a graduate nurse; I know what aphasia is, I would not want to write an examination on

it or anything like that. Yes, I know to a certain extent, I
320 do not know whether I can explain it to you or not. I know about what it means; they said that was what was the matter with Mrs. Magaw. I never gave Mrs. Magaw a physical examination; if I had given Mrs. Magaw a physical examination I do not know whether it would have enabled me to discover the aphasia. I know she had a hesitancy of speech at times; I do not remember who told me that she was troubled with aphasia; I heard it in a general way some time, but I do not think she had it. But I do not know, as I say. I never talked with Dr. Custis about it; I have seen Dr. Custis, but I never talked to him; I never heard him talk about Mrs. Magaw's condition; I do not know whether you would call it paralysis or not. I am not familiar with paralysis. If it was paralysis, it was very slight. I have never treated a case of apoplexy followed by paralysis and aphasia; have nursed them; I do not remember how many cases I have had; it has been several years ago since I had cases. I do not think I can recall the number of cases. I know there were more than one. I just took them in a general way. In my general observation of Mrs. Magaw I did not recognize her as such a patient. I am a friend of Miss Fague, I am acquainted with Miss Fague. I knew her in the hotel. I have been told that Miss Fague has some interest in this proceeding, a little. I have been told that she is one of the defendants. It was not Miss Fague who asked me to be a witness in this proceeding; I offered to come and help them in any way I could; I heard that the proceeding was pending, and I offered to Mrs. La Fetra to come and help them in any way I could to tell the truth. I talked with Mrs. Magaw a good deal, and I
321 know from my knowledge that Miss Fague was with her a great deal of the time. I should judge that Miss Fague knows as much about Mrs. Magaw's actions and words and general condition as anybody would. She was there with her; she was there with her and had as much opportunity for observation of Mrs. Magaw as anybody I know. I know of course that Mrs. Magaw was very elderly; I do not know just her age. I did not consider Mrs. Magaw very feeble, not for her age; she was rather bright for her age, she was able to go around her room. The first year and a half she was able to dress herself. I do not know so much about the last six months. I was not there to see her dress. I called upon her after I went away from the hotel, and before that I knew more about her. Her physical condition was good for her age most of the time. I would not say she was a very sick woman during the last two years of her life; I did not consider her seriously ill at all. Of course, as I say, for the last six months I do not know so much about it. As I say, we talked about things in general. I do not believe I can recall any one thing just before I left; I remember being to a missionary meeting, which is the last conversation I really remember anything about. I had been over to our church to a missionary meeting and, when I came in, she said, "Where have you been?" I said, "To a missionary meeting". She said, "Did you have a good meeting?" I said, "Yes". She said, "I wish I could go". I said, "I am sorry that you could not go; probably you can go some day." We talked on that subject, though not so very much, but I know she was inter-

ested in it. In giving this conversation I cannot say that I
322 have given Mrs. Magaw's exact words; I remember she said she wished she could go. I do not remember whether I have given Mrs. Magaw's exact words; I do not believe I can give Mrs. Magaw's exact words any nearer than I did. I do not remember just the exact words. I do not remember any of the exact words she used then, only she expressed herself in some way, I cannot tell you just how, that she would like to go herself, but I do not remember just the words. As a trained or graduate nurse I do not claim to have any secret or cryptic or unusual powers of discerning the meaning of a person, that another person does not possess. The last conversation I had with Mrs. Magaw was the day we moved, but I do not remember just the day; it was in February, 1907; I just went in to bid her good bye. She said she hoped we would like where we were going. It was just a general conversation, and she said, "I hope you will be pleased" or "like the new place", or something of that kind. I do not remember just the words. On that day when we were leaving, my husband was not there. She said "Tell your son good bye". She always called him my son. She said, "tell your son good-bye for me". They were her exact words, she called my husband my son. She always called my husband my son. "Tell your son good bye for me". I knew whom she meant. I never noticed that she had any difficulty in using words in the way of stuttering, or hesitancy of some kind. Sometimes she would hesitate and could not talk readily. Sometimes she could not pick the words she wanted. She did not have any trouble the last time I talked with her; she was very quick about it. She said "Tell your son good
bye", just as any one would say it, except that she used the
323 wrong word, used the word "son" in place of "husband", or in place of "Mr. Wagner". She could have used that term, but she used the word "son". She had done that frequently before. My husband was acquainted with her, and from my general familiarity with Mrs. Magaw's ways I have concluded that she meant my husband, and not my son. At this time when I left the hotel I think Mrs. Magaw was about the same as she had been for the last six months, I did not notice any difference in her, up to the six months before the time I left; there was no difference in her power of selecting the right word; it seemed to be about the same. I saw her on Thursday, I believe. If I remember correctly, she died on a Saturday. It was two or three days before. I saw her a month before her death; I think she was sitting up in a chair, if I remember rightly, a month before that. She was perceptibly weaker at that time. I do not think her health was so good then, and the difficulty of selecting the right word persisted to some extent.

Redirect examination.

By Mr. LEIGHTON:

The date of the conversation I have referred to with respect to the missionary meeting that I had been attending I think was the second Tuesday in January 1907.

MARIETTA TASKAR, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, testified as follows:

324 By Mr. LEIGHTON:

My full name is Marietta Taskar; just now I am in the Deaconess Home, acting superintendent; we have six deaconesses. They go out among the poor. Several of them are parish deaconesses and work in the churches with the pastors. (After examination of complainant's bill.) I know Mrs. Huntley, not intimately; I know Mrs. Tilton, I have known her a good many years; I know Miss Fague, and I know Mrs. La Fetra, the others I do not know. I knew Mrs. Alice D. Magaw in her lifetime, but not so very intimately. I knew her in the church, and I used to call upon her frequently in that way. That was my acquaintance, by calling upon her as a member of her church societies. My calls might have averaged once in two months. I think the last time I saw her was about a week before her death; I saw her perhaps two or three times in the months of February and May. I do not know that I can remember how many times I saw her, but I saw her occasionally during the spring, the spring before her death. Quite a number of times I used to take lunch with her and stay perhaps for two or three hours. The lunch was usually in her room; I am speaking of that spring before she left us, when she was not really able to go down regularly to her meals. She always was very anxious for me to come to lunch and take it with her in her room. That pleased her very much. She ate all right. Of course she could not see very well, but there was nothing repulsive or offensive in her manner of eating. During the last of my visits I do not think she was any different in that regard from what she had been at previous times when I saw
325 her, and what change there was, was due to her defective vision. We used to talk about our church matters some. She was interested in her missionary societies. I was in the Home Missionary Society, and she was interested in that, and especially so when we were getting up our barrels for our frontier ministers. That seemed to appeal to her as much as anything we could talk about, and she always wanted to contribute something on those occasions. Our conversation was not entirely confined to that subject; it was general conversation, I think. I was with her in social gatherings or religious gatherings in meetings a great many times, but not during the last few months of her life, not after she was unable to go out. I do not know as I can remember the last time I was present. I was with her two or three times at the communion service which she had in her room, that was the last year of her life; I should think it was in the winter, or perhaps in the spring. Dr. Bristol administered the service. Once it was in Mrs. La Fetra's parlor, and once or twice it was in Mrs. Magaw's room. I experienced difficulty in conversing with Mrs. Magaw; I did on account of her speech. She could not control her speech entirely. She could not bring out the words she wanted to always. That troubled her. I think that continued a year or two. She was troubled about conversing on that account; she was conscious herself of her trouble; it

was some physical infirmity. She could not get the words she wished to speak. She fully comprehended that, and she would say, "Oh, why can't I tell what I want to?" Her failure to select a word she wanted to use seemed to annoy her. I think she
326 was uniformly the same in that regard, as to the control of her speech the last year of her life. She was about the same on the different times when I saw her; I did not discover any particular change. I do not know anything about the execution of this deed that is in controversy, nor anything about the execution of the codicil to her will. She never said anything special to me in respect to business affairs, any business matters; she never said anything special to me about Miss Fague; she was fond of Miss Fague, and expressed her fondness, but nothing more than that. She never spoke to me about making provision for her in her will, to operate after her death. From what I saw of her and my intercourse with her, I should think she was capable of making a valid deed or contract, in my judgment; her mind seemed clear, although she could not express herself. Her mind seemed all right, as far as I could discover. When she was first taken ill, before she had this difficulty of speech I visited her. She was in bed, but she was like herself. She was very comfortable; she did not call herself really sick, but she was not quite right, and was advised by a physician to keep in bed. She said to me, "After I am gone, I want you to have my bed." I said, "Well, if you want me to have anything, you must make your will." She said to me, "If you will draw up a paper I will sign it," but I never did it. She spoke to me about the bed once or twice and she said "The bed must be yours," or "I want it to be yours after I am gone." She told me she had given the desk to a young lady friend of hers. I do not know whether she mentioned the other things or not. They were some of the
327 articles that went to the Deaconess Home. There was a little bamboo bookcase sent there, and a little chair. I received the bed that she spoke of, after her death.

Cross-examination.

By Mr. McDivitt:

I would not knowingly misrepresent Mrs. Magaw's condition for anything, I do not intend to do so here; and what I have stated, or that I will say, I intend it to be a real, honest, conscientious statement of my knowledge of Mrs. Magaw's condition. I remember there was a gentleman called one ev-ning at the Deaconess Home. I did not recognize you and yet I think it might be you, possibly. I think the statements I made to you then were like that I have made this morning, were they not? I do not remember that I said that Mrs. Magaw was old and feeble; she was old and feeble, there is no doubt about that. I do not think I discovered very much difference in her condition after she was ill. She seemed to be clear in her mind always when I saw her. I knew her, as I said. I had visited her as a member of our church. I think I did know Mrs. Magaw very well, and I communed with her, talked with her, and I understood her and she understood me. And I talked with her upon

subjects which seemed to be congenial to both of us. I do not think I called on her every month, but I think I called on her on an average perhaps of once a month. It was not always convenient all the time for me to call on her regularly every month. I do not know that there is any way to tell whether I called on her in
328 February, immediately before her death. I do not recollect that there was a missionary meeting of the ladies in February at Mrs. La Fetra's hotel, in the parlor. I remember that there was a meeting of ladies in Mrs. La Fetra's hotel at which Mrs. Tilton gave a talk with a map showing the islands of the sea and the stations; I attended that meeting; I do not know when that meeting was; I could not tell the date; I should say it was two years, at least, before Mrs. Magaw's death. I do not remember who presided at that meeting. I did not attend regularly, but I recollect that there was a meeting at which Mrs. Tilton gave a map talk. And that was two years before Mrs. Magaw's death.

Q. It has been testified here that there was such a meeting in February before her death—which of course was about six months before her death—at which Mrs. Tilton gave a map talk about the islands of the sea. Do you remember that meeting at all? A. I recollect such a meeting, but I really cannot tell how long it was before Mrs. Magaw passed away. I think it was more than six months. I should think it would be a year before that. I really cannot tell however, I cannot tell the date. I attended one at which Mrs. Tilton gave a map talk, but I cannot tell the date, I cannot recollect. I cannot tell whether I was at the meeting in February 1907 or not. Mrs. Magaw was present at the one I am thinking of, I recollect; it seems to me it was before her sickness; she talked well at that time. I don't recollect particularly whether she called the ladies by name. I think she was in her usual
329 health at that time. I presume she spoke to me about the meeting and about the proceedings. She usually talked with me about the meetings, but nothing special; I do not recollect that she did. There was something interesting about the use of the map; I do not know whether she mentioned that at all I do not recollect. I do not remember whether I mentioned it to her. One of the difficulties she had was in being unable to call objects by their proper names and it was difficult for her to call ladies by their full names, and that condition persisted until her death. In my talks with her she used such words as "spirits," "promise" and "trouble;" I think "promise" was the word she used the most. I do not recollect that I ever heard her use the word "Holy Ghost." I do not recollect the sentences now, but I know that when she tried to talk with us "promise" was the word she usually used, when I heard her talk. And I think because of my familiarity and close knowledge of her that I was surely able to understand what she meant, I thought I did. In my endeavor to understand what she meant I did not use any special test; if I did not comprehend, I would not trouble her any by questioning her, I let it pass. I think that Mrs. La Fetra was able to understand her better than I was, because she was with her a great deal more. I think that those

who were with her most could understand her best. That is for the reason that in order to understand her I think you had to know something more than the bare words that she used. Sometimes she would take up a little piece of food, when she was eating a chop; she would take up a bone as a great many do; I think that was due to her blindness, she was quite blind. I know that
330 she had had a stroke of paralysis, I think they called it a slight stroke, when she was first taken ill. I saw her shortly after her first stroke, she was in bed then. When she was first taken there was nothing at all irregular, but it was not many days before she seemed to have this slight additional stroke, and then it was when it affected her speech. We could not see, however, that it affected her mind. I did not notice any difficulty in the use of her hands or feet. I do not recollect that she had a stroke about eight or nine months after the first stroke. During the last six or seven months of her life, she did not seem to be sick very much. It was only this difficulty of speech that seemed to be troubling her more than anything else. She did not seem sick to me at all, except for just a very short time before she passed away. I knew Miss Fague. I do not think it was a waste of effort to have Miss Fague there night and day. I think that Mrs. Magaw needed somebody there to take care of her, because she was not able to wait upon herself, she was infirm and it was difficult for her to get up and down and out of her chair and to walk around. She needed someone to wait upon her; you may say it was because she was not well if you wish to. Anyone would say that her age would necessitate someone to look out for her. I know that all people of her age do not have a nurse night and day, but she was able to have one and I think she needed one to wait upon her; I think she was able to have one, because she had given me a good many times, donations for the work that I do, and I knew from her life that she had money. She had told me so. She told me one time of having quite
331 an income from a piece of property that was sold, and because of that she gave a donation to me for my work. I considered her a woman of substantial means; I do not know now what estate she left. It would surprise me to learn that the three houses on B Street, which were mentioned in her codicil, make up the largest part of her estate. I did not know how much her estate was; I supposed she had considerable besides that. That was the supposition I had. I mentioned that she had a physical infirmity incident to age I think it was only incident to age. Perhaps her age would prevent her entirely recovering from her paralysis, I think perhaps it would; I mean that a paralysis was one of the incidents of her age. I said she expressed her fondness for Miss Fague. I cannot tell you her words in expressing her fondness for Miss Fague, but her manner always implied that she was very fond of her, and the care that Miss Fague gave her would make any one fond of another. When I said she expressed her fondness for Miss Fague, it might not have been in words. I do not recollect any words; I do not know that I had any method of discovering whether her mind was clear or not, except from the words she used; I had nothing. I said she gave her desk to somebody, a young

lady; it was Miss Carrie F. Wolfley, who is now employed in the Census Office; I did not know Miss Wolfley, I was not acquainted with her. Mrs. Magaw frequently spoke of her favorably; I think she said that Miss Wolfley called on her. When I got the bedstead which has been mentioned it was sent to me by Mrs. La Fetra. I do not know that I can give some conversations that I had with

332 Mrs. Magaw within the last six or eight months of her life, giving her words as nearly as possible, and mine; I saw her a good many times within that period; I do not think I can recollect any talks with her, but I did have a good many talks with her; I recollect some things; I recollect we had a mutual friend—I do not think I can give you the words of the conversation, probably I cannot give you any of her words exactly as she spoke them. I do not recollect; I recollect the subject. Her words did not make complete sentences, because she did not carry out the sentence, perhaps that is the reason I have difficulty in remembering; I do not know but that is so; the only reason that I am unable to give any conversation, including some of the exact words of Mrs. Magaw, within a period of eight months prior to her death, was that she could not speak the words that she wanted. She seemed to comprehend fully what we said to her, but she could not reply in the words she wanted to use, and that is the reason for my inability to tell you her own words.

Q. If you had read to her any kind of a letter, was there any way in which you could determine certainly that she understood just what was read to her, except that she assented to it? A. If you will allow me to say, that was my thought in regard to it. She would assent to anything she was favorable to, and if she was not she would dissent.

Q. And that belief on your part comes from your long association with her and communion with her, and because you believed that you understood her? A. Yes, sir, I do.

333 Redirect examination.

By Mr. LEIGHTON:

I do not recollect whether I attended more than one of Mrs. Tilton's missionary talks in the parlor, I recollect of being there, I think it was at the first one she gave, but I was not able to go regularly, so that I do not know that I attended more than one. I do not recollect what time that was, it may have been February, so far as I know. At the meeting I did attend Mrs. Magaw was there; I do not think, Dr. La Fetra, missionary from South America, was there at that meeting, I do not recollect that. I have spoken of the difficulty in my examination, of remembering the exact words of Mrs. Magaw, I do not believe I could recollect the exact words of anybody with whom I had a conversation eight months or a year ago. I do not believe I could recollect anything special. I know the subject matter of my conversations with Mrs. Magaw; I do not recollect any of the subjects that we conversed upon so that I could state anything. The most that I think of is in regard to Mrs. Emory's death. At the time she died, Mrs. Magaw was very

much overcome by it, she was so interested that at the time of her funeral she had Miss Fague get the ritual and read the whole burial service to her at the time of the funeral of Mrs. Emory; I was not present; I only know that by hearsay. That was in September, the year before she died. She was not totally blind, I think one eye was totally blind, but the other only partially, I think there was a cataract.

334 Dr. G. W. N. CUSTIS, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, testified as follows:

By Mr. LEIGHTON:

My full name is Dr. G. W. N. Custis; I reside at 110 east Capitol Street, Washington. I have been engaged in the practice of medicine. Twenty years or more in Washington City. I graduated from the Medical Department of what is now George Washington University and from the Homeopathic or Hahnemann Medical College of Philadelphia. The character of my practice has been mostly general. I knew Alice D. Magaw in her lifetime; I attended her as a physician since somewhere in June 1901, to the time of her death. In the month of May 1907 I called on her only three times, the 3rd, the 24th and 29th, and then not until June 14th. I lost my memorandum of the calls in February 1907, but they were infrequent. Mrs. Magaw, two or three times previous to her illness of 1905, and reaching probably a year back, was troubled with an irritable heart. I do not know that you could say anything more about that. That period which developed the aphasic condition was preseded by about three days I think, of that same irritable heart condition, and during one night she developed the aphasia. The aphasic condition entirely relieved the heart condition. The sudden coming of the aphasic condition was somewhat of a shock to her system and affected her quickness of comprehension, but she became

335 afterwards much better, nearly all her symptoms, disappearing, excepting the slight aphasic condition. Aphasia is an inability to express thought in her condition by words. Aphasia is somewhat of a general term. There are several varieties of it. Hers was amnesic aphasia, the inability to express ideas intelligently, on account of loss of memory of words. The cause of it was clearly an embolus proceeding from the heart and lodging in a vessel of the brain that supplied the speech area, as made clear by the fact that the production of the aphasia relieved the irritable condition of the heart. I can only judge that there was some clot formed there, and that the breaking away of that clot or a portion of it, passing to the brain, produced the aphasia. I did fill out the death certificate as required by the Statute here; I had forgotten what I said, thrombosis is not the proper word, I should have said embolism. The difference between the two is that the clotting body in the case of thrombosis is formed on the site of the lesion, and in embolism it is carried to the site of the lesion, over the other portions of the system. They are substantially the same thing, excepting the time of the formation. Hers came suddenly. There is no doubt

in my mind that in her case the clot from the heart passed in the currents of the blood to the brain and was lodged there. I say the immediate cause of her death, in this certificate, is edema of the lungs and general exhaustion, a difficulty of breathing and some little evidence of effusion; and of course her age and general condition account for the general exhaustion of the system. Her condition improved to the extent that physically she was in very good condition, and her mentality was good. It was never bad excepting
two or three days, the few days that were required to get
336 over the shock, after which mentality was good. She understood perfectly, and it was very evident that she knew her own mind pretty well, but she could not express her ideas fully. Generally I could understand what she was talking about and at times she would speak quite intelligently on subjects immediately concerning her. She could not carry on an abstract conversation. She was very much worried that she could not talk to visitors, excepting in regard to things that were immediately about her; she could not express her thoughts otherwise; In May of the last year of her life her condition was good, physically and mentally. I have not got my record for February, but as I remember it the condition was good, as I remember my memorandum. Her power of expressing her thoughts during those months was good as compared with other months and as I say there were times when she could talk very clearly, with a little embarrassment, in regard, as I say to things right about her, things that she was familiar with. She talked with me in respect to her business affairs or matters, she talked with me several times, three or four times, about her difficulty in collecting rent. That was after her sickness; she was much troubled about the conduct of her agent at that time. She spoke to me several times about that; I presume I knew then the name of the agent, but I did not know the person, and so I do not remember the name. Yes, sir. that is the name Mr. Banes; she never talked to me about anything else, apart from her will. I knew her will had been made from her general talk, and at one time she became anx-
ious about some provision for Miss Fague, and made it very
337 clear that she wanted to make provision for her, so that she would be provided for during her life, and was anxious only, seemingly, as to how she could do it without disturbing that will, without writing a new will entirely. I cannot give you the date when this conversation with her took place, but it was after her trouble. I would not like to say it was during the year of her last illness, because I do not remember with certain distinctness. When I was looking over my books, and judging of her general condition at the time of the date of that codicil, which appeared in the paper, her condition then was excellent. I did not know certainly that she made her codicil to her will until I saw it published in the paper. I think I saw in the paper the deed that is the subject of this controversy—an account of that. I knew of the deed. Whether I knew it from her or whether I saw it in the paper, I do not remember. And I made an examination at the time I saw it of my book; I saw then that her condition was excellent, physically and mentally. I went to see her not oftener than I thought it was neces-

sary. I did not go as often as she sometimes expressed the wish that I would, and I left her at times with the confidence that if she did get in any worse condition she would very soon send for me. When she was relieved of whatever condition carried me there, I discontinued my visits generally until she sent for me. Aphasia may exist with no disturbance of mentality, and most generally the mentality is very slightly disturbed. In her case, excepting during the short period I have spoken of, as the result of shock from the
sudden stoppage of the circulation in that portion of the
338 brain her mentality was good. She understood what was
said to her, and she knew what she wanted. She was very decided in her opinions at times, and her only difficulty was that she could not express clearly her thoughts, losing words, forgetting words, that was her condition in May 1907; He mind was clear; her sight was defective, due to the formation of a cataract; there was only one eye where it was very pronounced, I think the other was slightly affected. She could not read when it was at its worst. That was a gradual formation, and for some time it troubled her to read. In its development I suppose she could hardly read at all. I do not know whether she entirely lost ability to read; I knew she was generally read to, during the last year or two; but her sight, at a distance, was such that she could distinguish objects and get around the room. Her vision was better at long range than at short; she suffered an operation for cataract. Miss Fague was an attendant who was assiduous, efficient and sympathetic. She was all to Mrs. Magaw that anybody could be in that position. I think she spoke to me twice about the codicil. It was before she had made the codicil; I did not know that it had been made actually. I first learned that she had added a codicil to her Will when it was published in the paper subsequent to her death. I knew that she contemplated it, knew that she was anxious as to how she could secure that property to Miss Fague: but beyond that I did not know that it was actually done. I learned in those ways, in those conversations about
it that she possessed those three houses. I did not know cer-
339 tainly of anything more, excepting that I supposed she had
other property; but those three houses were the only property I knew certainly of. She spoke with me on religious subjects several times she referred to them, to her relations to the church, and I knew that she was an extremely devout person, one who always wanted the Bible read to her. I remember on one occasion, for some reason or other, Miss Fague, her attendant was not there, and she regretted it on that account, and I read a chapter or two myself to her. She spoke to me in respect to the missionary work that was being done by the church. She was very much interested in Missionary work, and very much devoted to her church. Mrs. Magaw was bright intellectually, and very decided in her opinions. She might be very easily influenced in the direction she wanted to go. I have seen her very impatient when anyone undertook to lead her somewhere else.

Q. I have asked you to read the hypothetical question that was propounded by counsel for the complainant to Dr. Wilfred M. Bar-

ton, and I ask you to state whether or not you have done so? A. I read it hastily as I started down here.

Q. I will hand you his evidence, and ask you to read it carefully to yourself. (Handing a bundle of testimony to the witness, who examined same). State whether or not the facts stated in that hypothetical question correctly represent the mental and physical condition of Mrs. Magaw? A. They do not. Inasmuch as they do not accurately represent her condition, any answer that I might give to the question would simply confuse the case and give
340 you no light upon it whatever. Things are assumed there which did not exist, a general condition given which does not suit her case. After the death of Mrs. Magaw, an attorney—I do not remember the name, called to see me once, and I think afterwards I had a letter from him. I cannot find that letter, though, and do not think there was anything particular in it. I do not remember distinctly whether it was Mr. McDivitt.

Mr. McDivitt: It was not I, I never saw you before this morning.

The Witness: I hardly thought it was. The attorney called to see me and I think I had a letter from him afterwards, although I will not be positive, because I cannot find the letter. I wrote a letter myself to the attorney, whoever it was, that called to see me, I suppose. I do not remember the name. It was the attorney for the complainant, at any rate. He represented himself to be, I do not know his name. He was from Brooklyn, and my letter was sent to Brooklyn. I did not preserve a copy of the letter which I mailed.

Cross-examination.

By Mr. McDivitt:

It may be that dementia sometimes is accompanied by aphasia. It sometimes happens in a general affection of the brain. I did not come here at the request of Mrs. La Fetra to-day; she did not ask me to come today. I have not talked with Mrs. La Fetra about this case. I met her once on the cars and simply remarked that
341 I was surprised that there was any contest of the Will. We passed a few sentences while I was riding in the car with her. I have never spoken to her in regard to it. Mr. Leighton asked me to come here to testify. I know Mr. Leighton very well, and have known him for many years. I know Mrs. La Fetra very well. I am a member of the Metropolitan Presbyterian Church. I have known Mrs. La Fetra for many years. I knew at one time that Mrs. Magaw's son, Van Brunt, wanted to have a guardian appointed for Mrs. Magaw. And I said that I would not testify at that time that she was incompetent. I treated Mrs. Magaw during the last two years of her life as if she was not affected in the slightest by dementia; there was no dementia. I would not like to say that I came here with the idea in my mind of making it clear that there was no dementia in Mrs. Magaw at all; I came here to give my testimony. I came here with the idea of testifying that Mrs. Magaw was not demented at all, if I was asked the question. There is no

doubt in my mind that there was no dementia; neither senile dementia or any other kind. If I could explain about when Mr. Magaw wanted a guardian, I could clear that up. I am anxious only to give my testimony in this case. I am not anxious to give any more testimony than you are asking for. I am not willing to answer your questions exactly as you put them if a categorical answer should be the means of confusing what my own mind is in regard to the matter. If it is possible for me to give an answer to the question asked categorically, I do not know whether I am willing to do it without further explanation.

Mr. LEIGHTON: I beg to state, for the record, that my in-
342 structions, to the witness are that if he desires to make any explanation, after he has answered Mr. McDivitt's questions, he has the right and privilege to do it.

The WITNESS: I will explain that about Mr. Magaw when I have the opportunity.

By Mr. McDIVITT:

I do not think there is any danger of my becoming confused by any question that you might ask me. My only fear is that a categorical answer might convey a wrong impression as to my real opinion. These categorical questions and categorical answers do not always tell the truth, simply because they do not give you the opportunity of expressing what your real thought is. I am able to say affirmatively or negatively whether or not Mrs. Magaw was suffering from any kind of dementia. She was not.

Q. Do physicians possess any secret or unusual means of discovering whether a person is demented, that ordinary persons do not possess? A. Yes, if it is a——

Q. Can you answer that, yes or no? I ask you whether they do possess any secret or unusual means? A. Well, I should be tempted to say no, with an explanation. I cannot answer it safely or truly without an explanation. The tests used by physicians to determine dementia are simply an observation of the patient's appearance, speech the intelligence that is manifested in answering questions, their comprehension of the significance of things immediately around them. When I say, the comprehension of things around them, I call that a test; if you were to examine a person with
343 regard to mentality, there are no such tests as physical tests; there are no physical tests. You could hardly call them physical tests for the purpose of determining whether the patient comprehends things around him, you can ask questions of them, and judge by the character of the answers. If they are unable to answer it is a pretty fair evidence that there is a lack of mentality. In the case of being unable to answer at all it might be a case of paralysis of the organs of speech, paralysis of the tongue or larynx. Assuming that there was no such paralysis of the tongue and vocal organs, if the patient was unable to reply to my questions, that would indicate a disturbance of mentality. There might be this aphasic condition, which would prevent their expressing themselves clearly. The

thought may be clear in their own minds, but they cannot express it perfectly, through lack of memory of words.

Q. Then if a person is affected with partial aphasia, from any cause, it is impossible to test by her replies to questions whether she is demented or not, is that so? A. By talking with her.

Q. Will you answer this question? Try to fix your mind on this question.

Mr. LEIGHTON: Answer it in your own way, Doctor.

The WITNESS: What was that question?

(The last preceding question was repeated by the stenographer.)

By Mr. McDIVITT:

Q. Do you understand that question, Doctor? A. Yes, sir,
344 but I would not answer it without opportunity for some explanation.

Q. I will ask you another question. You have stated that one of the tests applied by physicians to determine whether a patient is suffering from dementia or not is to ask the patient questions and to determine it by the character of the patient's replies. Is it not a fact that when the patient is affected by partial aphasia that it is impossible to rely upon those tests? A. I would say——

Q. Is it not impossible to rely upon this test under those conditions? A. I would say no.

Q. What is dementia? A. Put in the plainest terms dementia is a disturbance of mentality. A person who is demented is not in his right mind, he is not capable of safely attending to his business affairs.

Q. Mrs. Magaw in 1905, suffered a slight stroke of paralysis, did she not? A. Answering catagorically I should say that Mrs. Magaw in 1905, did not suffer a slight stroke of paralysis. It is a fact that when Mrs. Magaw was first stricken that it was caused by an embolus, passing from the heart to one of the vessels of the brain, and causing a stoppage, and thereby cutting off the supply of blood from certain areas of the brain. There was no positive paralysis as the result of that; there was, you might say, a very slight paralysis. I did not call it paralysis at all. There might have been a little less freedom in the use of the right arm than the left. Those about her
345 had the impression that she was partially paralyzed. I did not think so. She did not have another stroke in 1906. I attended her in April, 1906. I attended her to the time of her death.

Q. Miss Fague has testified here that in 1906, I think she said, Mrs. Magaw was found one morning in bed, before she arose, with her face decidedly drawn to one side, and that some white substance like a cord was in her mouth, and that Miss Fague removed it, and that Mrs. Magaw was quite sick at that time. Do you remember that occasion? A. I presume that I remember it, although I do not remember anything about that cord, and about that particular condition. I do not remember that her face was drawn to one side then; I think I saw her the next morning; I know whether I saw her or not, I am positive I did. I do not remember whether it was

morning or evening. I think rather it was the evening. I think I was sent for and went to her at the time. She seemed to be in a somewhat depressed condition. I found no evidence of paralysis. She was simply a little worse at the time. We are all subject to little depression at times. I examined her foot or limb sufficiently to satisfy me that there was no real paralysis. The examination was made by simply moving the limbs, trying to move the limbs, moving them sufficiently to show to my mind that there was no paralysis. I looked at her hand; as I remember it, I think Miss Fague did make some remark to the effect that Mrs. Magaw's face was drawn to one side but I did not see it. Those about her were looking constantly for those symptoms, and often sup-
346 posed a worse condition than I did when I saw her. Those about her were always looking for the slightest manifestation of trouble, looking for paralysis. They thought she was likely to suffer from paralysis; they were expecting her to be carried off by a stroke of paralysis. Miss Fague and Mrs. La Fetra, I guess, thought she would go in that way; and they were very observant of the slightest changes that menifested themselves in her condition. I noticed no atheramatous condition of her blood vessels. I did not specially examine to ascertain. In all of my examination of Mrs. Magaw I would notice what the nurse said, as calling my attention to these things and I examined the things to which she called my attention; but further than that I made no special examination. I was satisfied from what I saw, and from what I learned, as to what the real condition was. Of course I looked at it from a different standpoint, and could tell more certainly what the real condition was. I could hardly say that Mrs. La Fetra and Miss Fague and others continued to think that she might be carried off by a stroke, until her death. It was very natural for them to entertain that idea, and it would have been very natural for myself or any physician to entertain it. I thought it was natural; it would have been a natural sequence; I thought of it only as a possibility. It would have been a very natural termination of her life. I thought so because of her age, and the existence of this aphasic condition, which is a condition affecting quite a locality in the brain, would lead me to suppose so, to suppose that that would be a natural ter-
mination of her trouble. This embolism formed in the brain
347 had the effect of cutting off the blood supply from certain areas, from the speech area, not all of them They seemed to be very much divided. It was not one locality covering all the manifestations of trouble in conveying thought: it was a modified area of the general speech area, a limited area of the general speech area. I do not make a specialty of mental and nervous diseases. I have read up for the purpose of preparing myself to testify in this proceeding. I have looked over some general literature; I have read Dr. Goodnow's book, and I have read one or two others, a little in them—just enough to call my attention to the names, which I cannot remember, and do not remember now. I am sure that Mrs. Magaw had no dementia and I was sure at the time that she was sick, during the last two years of her life.

Q. You never suspected that she had it? A. I was satisfied in my own mind that there was no dementia.

Q. You acted upon the assumption in all your treatment of her, that there was no dementia? A. Yes sir. I did not at any time carefully and conscientiously from a medical standpoint, apply all the known tests to determine whether Mrs. Magaw was in any way affected by dementia. I applied no special tests. My general conversation and observation convinced me, without going into any critical tests, which would simply have been confusing to a person of her age and condition. I have no unusual or cryptic or secret method of determining whether a person is affected by dementia, which an ordinary person has not. I think a person of
348 general intelligence, without being trained as a physician, could determine whether there was dementia or not by the character of answers to questions, by calling their attention to particular objects, and seeking to ascertain their names and uses, etc. There is no physical test that I am aware of. It is a matter of general intelligence on the part of the examiner. A layman of equal intelligence to myself could determine whether a person was demented or not as well as I could.

Q. Do you think that a woman eighty years of age, suffering from the effect of an embolism in her brain, in the vessels of her brain, and who could not recognize her own son, whom she had known very well and had seen frequently before the embolism existed, was in her right mind? A. If you take it just at that moment, it was an inability; it was not a dementia; not a general disease of the brain. That condition might speedily pass away and leave her mentality unimpaired.

Q. Do you think that a woman eighty years of age, who had suffered an attack of slight paralysis and aphasia, following an embolism in the vessels of the brain, and who thereafter during her lifetime was unable to recognize her own son, with whom she had previously been very familiar, and friendly, was in her right mind? A. That was not the case with her.

Q. I know it. I am asking you whether you would say, in answer to that question, that she was in her right mind?

Mr. LEIGHTON: The question is objected to as not proper examination, and as not correctly representing the condition of Mrs. Magaw at the time this deed was written.

349 By Mr. McDIVITT:

Q. Do you understand the question? A. Yes, and my answer is that it is not evidence of such a disease of the brain as would preclude a rapid restoration of the power of recognition. In this case there was that early removal of that trouble.

Q. You are plainly repeating what you understand Mrs. Magaw to have been. I am not asking you about Mrs. Magaw. I am asking you whether such a person as I have described would be, in your opinion, considered in her right mind, or not? A. Supposing that to be the case continuously, for the time that Mrs. Magaw was sick,

which was some months, I would say no. This heart irritability I speak of was a condition where the pulse was rapid, weak and intermittent. It did not have any medical name, that is the best generally recognized medical name—just an irritable heart. There was no organic disease. I have no doubt but what there was a clot pressing somewhere in the region of the heart, that caused it. That was my opinion, and substantiated by the history of the case. With a qualification I can say I did consider Mrs. Magaw a pretty sick woman during the last two years of her life. Her age and the aphasic condition made her general condition critical, but at times she was in good health otherwise. Her general condition was good, and I could hardly say that I considered her a sick woman in the sense that a person with pneumonia for instance, would be very sick. She
350 was not free from the infirmities of age, and the aphasic condition. That is the result of the embolism. The embolism remained during the rest of her life in a slight degree. I think that the area which was at first occluded by the embolus was later supplied by the blood in a measure because her aphasia became very much improved. There must have been an absorption of the clot or a compensative blood supply. There is a tendency where an artery is occluded, for the system to carry blood by other vessels to supply the deficiency occasioned by the occlusion of that vessel. Sometimes there is a compensation from the other side of the brain. We have two brains practically, and sometimes where the left is affected—which is probably almost certainly the case with her—the lobe of the right brain becomes educated, as it were, to supply the deficiency of the left. I have dissected several brains, I do not know how many; it has been some time ago when I was in college; I have seen others opened, but I have not done the work myself since then. It is a fact that the effect of embolism and thrombosis upon the brain are substantially the same. One is a sudden and the other is a gradual occlusion.

Q. And is that the reason that you certified the primary cause of Mrs. Magaw's death was cereb-al thrombosis? A. I said thrombosis in Mrs. Magaw's death certificate just simply because I mistook the word at the time. I do not know just what the circumstances were when I drew that. I think I was in a hurry at the house. Aphasia of old age sometimes troubles me a little; I sometimes miss a word. This aphasia that I am troubled with, the aphasia of old age is not
continuous. I am very seldom troubled with it. It is a fact
351 that there are numerous kinds of aphasia.

Q. Is it not a fact that some people who are really demented are troubled with aphasia? A. It is not aphasia proper in that case. It is because they are lacking the power of comprehension, of the meaning of words. The aphasia exhibits itself by a difficulty in the use of words. In a proper definition of aphasia, it is an affection of the speech and inability to use proper words. There is no diagnosis of heart disease which produce troubles in the brain, excepting that a heart disease may impair the circulation of the blood in the brain generally, and that that may impair the circulation in the system generally. Embolism and thrombosis may occur at any age, though more commonly they occur in advanced age. Throm-

bosis, I should say, was more apt to be developed at an advanced age. It is difficult to tell whether a person of advanced age is affected by an embolism or a thrombosis unless there are special circumstances that will lead you to determine, as there were in this case.

Q. What are the predisposing causes of embolism? A. Embolisms are caused generally, if not entirely, by a condition of the blood in which the fibrin is abnormally abundant, that is the main or only predisposing cause of embolism. The predisposing causes of thrombosis are the same. They are both blood clots. I differentiate between a case of embolism and a case of thrombosis probably by the fact that thrombosis is more slow in its formation, and you may detect the progressive development of aphasia, in the speech areas of the brain. The embolism is sudden or rapid in the de-
352 velopment of its effects. In the case of an embolism, it just goes to the spot at once, and its effect is very quickly seen. The effect is very marked and very rapid. That is not called a stroke of apoplexy. Apoplexy is a different thing. If it was a serus apoplexy, there would be a sudden pouring out lymph from the lymph vessels upon the brain. If it should be a blood apoplexy, it would be a rupture of a blood vessel in the brain, not an occlusion. I would not say that when a person is stricken from the effects of embolism, occluding the blood vessels in the brain, that that was a stroke of apoplexy. Apoplexy is always followed by paralysis. There is the apoplexy from the rupture of a blood vessel; there is a serus apoplexy. I have described the difference between them—it is all blood, but it is the serum of the brain which escapes from its proper cavity and pours into some portion of the brain. Those two things are the only things which cause an apoplexy. I do not remember from what the word apoplexy is derived. In my every day life it means simply an affection of the brain, arising from pressure through rupture of a vessel or the overflowing of lymph of the brain, producing pressure upon the brain substance, resulting in paralysis in some part of the body; and I say that an embolism or a thrombotic condition of the brain does not produce an apoplexy excepting to a very slight degree, and pending upon the extent of the occlusion. Aphasia is sometimes accompanied by a slight paralysis, in cases of occlusion of blood in the speech centres of the brain. The occlusion is so debilitating in its effects that in severe cases it would
353 not cause an apoplexy. It is a fact that very many people have suffered from the effects of an embolus passing from the heart to the vessels of the brain, and have been struck down immediately, unconscious. I think that may be so. I would not call that apoplexy. The prognosis of embolism is good and I would say the same as to the prognosis of thrombosis, but not so decidedly; thrombosis occurs slowly; it is a gradual formation.

Q. What occurs to the temperature in thrombosis? A. I cannot answer.

Q. You mean the same way as before, that that is a detail upon which you are not posted? A. Yes, sir. It may be some time in a case of thrombosis before an improvement is marked, a much longer time than in an embolism. In embolism there is always hope of a favorable issue, but of course the continuance for a long time reduces

the probability of recovery. Whether the condition of the patient as it exists, say, three months after the embolism occurs, is likely to continue—that is whether the patient is likely to get worse or better as the result of the embolism depends entirely upon the recuperative power of the patient; you cannot tell. I would say the same thing in regard to thrombosis; so that if a patient had a strong recuperative power, his condition after three months from the time of the occurrence of the embolism might be much improved. The fact is, that at first it is impossible to tell what the improvement will be, and sometimes in thrombosis and embolism, both, the improvement is very marked in a few days or weeks. After a month or two
354 the condition is not stationary, but there is not as great probability of a rapid recovery. The improvement still continues; I mean to say that a person of strong recuperative power would show a great improvement; that applies to both embolism and thrombosis. In some diseases the aphasia is complete of course, the brain may be diseased in those centers. In some cases the aphasia rapidly passes away so that within a few weeks or a few months a person's speech is entirely restored. As a rule, wherever aphasia occurs, there is a tendency to improve and when the improvement takes place the patient recovers his n*r*omal powers of speech. If a person is an Englishman, and is troubled with aphasia so that he is unable to talk, when he recovers his powers of speech he talks English again, and not German. If he talked in German, it would be an abnormal condition that does not depend upon aphasia.

Q. If a person has been troubled with aphasia and slightly recovered his power of speech, but was unable to use his words in sensible connection, would you say that that indicated the full mental powers? A. It may exist with full mental powers, because aphasia is simply the result of a lesion in that circumscribed portion of the brain and does not involve general intelligence, ordinary intelligence.

Q. And the fact that when a person recovers, or partially recovers, from the aphasic condition, that he uses words without sensible connection, does not indicate that the mental powers are affected? A. Yes, sir, it does not necessarily if it is a true
355 aphasia, or if it is the result of a local lesion. A condition of general brain disease may affect those centers of course. In that case the aphasia would be the result rather of the general brain disease, rather than the aphasic condition being the result of local lesion simply. I have not made a study of brain diseases. When this embolism occurred in Mrs. Magaw; I knew that it was a brain disease; I knew the trouble was in the brain and I did not call in any other physician to consult with me regarding her condition at the time. My son saw her once or twice with me, for the satisfaction of those who were in the house. My son is not a specialist of brain diseases. I did not call in any other physician in consultation.

Q. In view of the fact that the question of whether the aphasia of Mrs. Magaw would indicate dementia, would depend upon the cause of the aphasia, and in view of the fact that you have not made a study of brain deseases, why did you not call in some one who was familiar with that branch of medicine? A. For the simple reason

that I felt absolutely sure as to the cause of the aphasia, and that no one could throw any greater light upon the subject, or treat it more successfully, or know more of the treatment. There was no occasion for it, unless it had been for the satisfaction of those who were about her.

Q. But sometimes this aphasia is caused by a demented condition of the brain or of the person. A. A general dementia may cause aphasia. It would not be really a true aphasia. It
356 would be a general lack of intelligence in regard to the meaning of words. It is not a true aphasia; a general and not a local trouble.

Q. But as you were not a specialist in brain diseases or not having made a speci-l study of brain diseases, of course you were not able surely to tell whether this aphasia was caused by a local trouble or whether it was a general brain disease, were you? A. My mind was perfectly clear in that matter, because there were circumstances that were almost certainly determined.

Q. What were those circumstances? A. Simply this: That there was this irritable condition of the heart that was developed and continued for about three days. Suddenly at night the aphasic condition was developed to the entire relief of the heart. It almost necessarily determined that it was an embolism and that that embolism escaped from the vessels of the heart and was carried to the brain. That blood clot undoubtedly caused the irritation of the heart, and when it escaped from there and passed to the brain it relieved the heart. The condition was so marked that there was hardly a possibility of mistaking it.

Q. Will you explain why it was that you were so certain of the condition and the cause of Mrs. Magaw's condition, when you have not studied brain diseases specially? A. Because I had studied brain diseases generally, and that condition is a very marked one in general medical education. You can trace out every vessel through which it would pass, that clot; and I have been able to give
357 you the names of every vessel that it would pass through; and I think it was one of the questions in my examination.

Q. In college? A. Yes, sir.

Q. Have you made a special study of the subject since your college days? A. No.

Q. Is it not a fact that persistent aphasia, in nine times out of ten cases, is cereb-al softening? A. I would not say that it is so frequently the case, but cereb-al softening in the speech areas will produce the aphasis.

Q. Is not that what happened in Mrs. Magaw's brain, in your opinion? A. No, in my opinion it did not.

Q. In your opinion there was no cereb-al softening as the result of an embolism? A. No.

Q. What is cereb-al softening? A. It is a condition in which the gray matter of the brain loses its consistency and the fibrous matter of the brain is increased. You might say it is more a hardening than a softening, but it is spoken of generally as a softening of the brain. It is a softening of the gray matter really.

Q. Is it not a well known medical fact that cereb-al softening has a particularly bad influence upon the mind, and is often fol-
358 fowed by insanity? A. Oh, yes. It is a fact that persistent aphasia is exceptional in thrombosis and that it is common in cases of hemorrhage? I feel pretty sure about these things from general knowledge, from my experience and my practice, without having recently studied these things.

Q. Have you had a good many cases of Thrombosis? A. No, they are very rare.

Q. Have you had a good many cases of embolism? A. No, they are very rare.

Q. Have you had a good many cases of apoplexy caused by hemorrhage? A. Yes, serus apoplexy. Quite a number of cases of blood apoplexy do not generally leave you much time. It takes you away suddenly. I have had quite a number of cases of serus apoplexy.

Q. You say that cases of thrombosis and embolism have been rare in your practice, or are rare generally? A. Yes, and they are rare generally. In effusions that have disturbed the speech, serus apoplexy which has destroyed the power of speech measurably or entirely—I have had several of those kinds of cases.

Q. You refer to apoplexy caused by hemorrhage? A. To serus hemorrhage.

Q. And not to thrombosis or embolism? A. No sir.

Q. Is it not a fact that in cereb-al hemorrhage, if the person is affected by aphasia or the loss of the powers of speech, that generally the patient rapidly recovers the powers of speech or gets
359 worse? I mean the condition gets worse? A. That would be true probably as to embolism. There is not the general disturbance of speech from apoplectic conditions. In serus apoplexy you may recover in three or four months, or it may be a much longer time.

Q. You mean as regards speech? A. Yes, but that is an affection of the muscles.

Q. Is it not a well known medical fact that in cereb-al hemorrhage the patient as a rule recovers her powers of speech quickly? A. Well, I would hardly say so, because I know as a rule it requires some weeks in very slight cases, and it may be some months in more severe cases.

Q. And yet, unless they die they do recover their powers of speech? A. They are very apt to.

Q. Do they not generally do that? A. Yes, but it may take some time before they die.

Q. Can you refer to any case within your experience in cereb-al hemorrhage, where the aphasia persisted for two years after the hemorrhage occurred? A. Yes, I have known cases where they have persisted for two years. It was not a true aphasia. It was the result of loss of muscular power, the muscles of phonation, either the larynx, the tongue, the lips or the mouth.

Q. Is that the only case you can recall now? A. Those are the cases in which it may persist for a long time.

360 Q. But in other cases where the organs of speech are not affected, and the muscles—— A. They are apt to get over it in a comparatively short time. It may persist, though, for a year or two, depending as I have said before, upon the recuperative power of the patient.

Q. You said that in regard to embolism and thrombosis. A. Yes sir.

Q. You now say it in regard to cereb-al hemorrhage? A. Yes, in regard to cereb-al hemorrhage. Of course, it depends a great deal upon the condition of the patient. It must be removed by an absorption of the fluid and in a strong active person that absorption is more rapid than in a weak emaciated person.

Q. Would you say it was an exceptional case of cereb-al hemorrhage where the patient was affected with aphasia and did not recover rapidly the powers of speech, or else declined to death? A. Yes, I think that would be exceptional.

Q. Then you mean to say that the general rule in cereb-al hemorrhage is that the aphasia passes away very quickly or the patient seriously declines in health? A. Yes sir.

Q. Is that the rule in regard to thrombosis and embolism? A. Yes sir.

Q. The same rule applies? A. Yes sir.

Q. Then you want us to understand that Mrs. Magaw's
361 case of embolism was an exceptional case, and not within the rule? A. No, I would say that Mrs. Magaw's case was not exceptional, and that she did not entirely rapidly recover from the aphasia was due to age.

Q. The fact that she did not entirely rapidly recover from aphasia—— A. Was due to her old age. If she had been a young, vigorous patient, I think it would have passed away in a very short time, that it would have been absorbed.

Q. What would have been absorbed? A. The blood clot, which occluded in the blood vessel and produced the aphasia.

Q. Is it common for such clots to be absorbed? A. Yes sir.

Q. Have you looked up any authority upon that subject? A. I have glanced over one or two books.

Q. Can you give me the name of any authority which says that the clot formed by an embolus will be absorbed? A. No; I cannot give you the names of the books, but I can tell you that they may be absorbed. Their effect may pass away, as I have said before. by the establishment of a collateral circulation.

Q. That has nothing to do with the absorption of the clot. A. If you will confine it simply to the absorption of the clot.

Q. Yes. Can you give me the name of any authority which holds that such a clot in the blood vessel is ever absorbed? A. No,
362 I cannot give you the names of the authorities. I know it from my general reading and information on the subject.

Q. Will you bring me the name of some authority, at some other time? A. I think I can. Whether it would be in answer to the question of whether a clot will be entirely absorbed or not, I will not say as to that.

Q. You do not know whether there are any authorities which say that the clot formed by an embolus in the blood vessels of the brain is ever absorbed? A. I think that I can bring you the authorities.

Q. You are not sure about that? A. No, because I have not sufficiently gone over the literature recently.

Q. Is it not a well known medical fact that in embolism or thrombosis, the condition of a person's mind and health remains the same as exists, one month after the occurrence of the embolism or thrombosis? A. I do not think so.

Q. Or that the patient rapidly declines? A. I would not say so.

Q. In this case you say that Mrs. Magaw was suffering from embolism in the blood vessels of the brain and that her condition improved, and that she lived for nearly two years thereafter, and that her aphasic condition persisted until her death? A. Yes, and that that aphasia——

Q. And that you are not specially qualified to give testi-
363 mony upon the diseases of the brain generally, and that you have not made a special study of dementia, and that you did not apply any of the tests which at the present time the authorities determine are necessary to be used in order to determine whether dementia exists under the conditions which you found in Mrs. Magaw? Can you answer that? A. You have too much there for me to answer.

(The question was repeated by the stenographer.)

Mr. LEIGHTON: The question itself is objected to, in that it involves a series of questions, and that it is a repetition of what has already been answered once or twice by this witness.

By Mr. McDIVITT:

Q. Are you able to answer? A. I am able to answer, but I would not like to answer it in that way. I can tell what was almost inevitably the condition of Mrs. Magaw, and I know that the aphasic condition was exceedingly limited, the lesion limited to a very small section of the brain, that portion of the brain which controls the use of speech. I can say of course that I am not an expert in brain diseases. My general information and my general education, however, enable me to detect very readily special mental troubles.

Q. To your own satisfaction? A. To my own satisfaction, yes.

Q. Is it not a fact that thrombosis is more common in old people than in young? A. Yes sir.

Q. Did you examine Mrs. Magaw carefully as to any ar-
364 teriosclerosis? A. No, there was no——

Q. Did you examine her carefully as to that? A. No, I did not examine her, for the reason I would not have examined her for——

Q. For Bright's disease? A. Yes, Bright's disease or diphtheria. I did examine her for Bright's disease, so as to remove that out of the category of possible troubles.

Q. Is it not a fact that arterial sclerosis or atheroma, are important predisposing causes of embolism? A. Yes sir.

Q. In determining whether Mrs. Magaw was slightly demented or not, what test did you use? A. No other test than simply observation and conversation. There was never the slightest indication of a dementia.

Q. Did you have in mind that she might be demented? A. Yes, I had it in mind, for the reason that it was suggested to me right in the beginning.

Q. What suggested it to you? A. Those who were about her.

Q. And not her condition? A. No, not her condition. I knew she was not demented.

Q. You say you examined her by general observation and by talking with her? A. Yes, sir.

Q. Those were the tests you used? A. Yes.

365 Q. What did you observe about her indicating a lack of dementia? A. There was the simple fact that she could understand me perfectly, and that as a rule——

Q. I want to know what you observed, not the operation of her mind.

Mr. LEIGHTON: You are entitled to complete your answer.

A. There was nothing I observed that led me to suspicion any lack of mentality, even when the possibility of such a thing was spoken of by those who were about her, those who were there at the time. I saw her probably a couple of days afterward, and they wanted me to bring in an expert from St. Elizabeth's to determine her mental capacity. I told them no, that there was no room for an expert.

Q. Who wanted you to bring in this expert? A. I think it was Mrs. La Fetra. There may have been one or two others there. I do not remember now.

Q. When was this? A. A couple of days probably, after she was first stricken in 1905. Of course they thought she was going to die right away, in the first place and afterwards they thought her mentality was gone; but I could see no evidence of either one, and I declined to call in any expert, and told them that she was not going to die right away.

Q. You have not told me what you observed about her. You have told me what you did not observe. A. There was nothing to observe.

Q. You say there was nothing to observe? A. No.

366 Q. Then your test for dementia was based upon the observation of the patient and resulted in nothing to observe. A. There was nothing observable in that direction.

Q. The other test you mentioned was the answer to your questions? A. Yes.

Q. This that you speak of now was immediately after her first stroke? A. Yes sir.

Q. Are you able to give us any questions that you asked her? A. No. They were just general questions, as to how she felt about the head, if her head troubled her, did she have a headache—such questions as those.

Q. Was this the first day you saw her the same day? A. I will not say the first; the second or third, I think.

Q. When you first saw her she was not able to speak at all, was she? A. No.

Q. How soon after the attack was she able to talk at all? A. Within two or three days. I know after the second or third day I was perfectly satisfied as to her condition.

Q. What did you ask her? Can you give me any special questions that you asked her? A. No, I could not say anything further than that I asked her as to her general feelings, and as to whether there was any pain in the head, anything of that kind.

367 Q. Can you give me her specific replies? A. No.

Q. Can you give me any words she used? A. No.

Q. You cannot give me any sentence she made at that time? A. No. They were not marked, and I did not make any note of them.

Q. Did you apply any tests for dementia at any other later time? A. No. There was nothing to lead me to suspect it. I knew there was no dementia there.

Q. And that was the only time you examined her with reference as to whether she was affected with dementia or not? A. I will say yes, because there was no dementia there to test.

Q. You have said this morning that you had no secret or clairvoyant power of determin-g whether Mrs. Magaw's mind was demented or not? —. ——.

Q. And you judged from ordinary observation of her, and her demeanor, and her answers to your questions? A. Yes.

Q. And yet you are not able now to give me any questions you asked her, or any answers she made? A. I would ask her as I would any patient, the general questions, as to the condition of her health—as to the condition of her head, stomach, or heart.

Q. But you cannot give me her specific replies to any
368 questions that you asked her? A. Excepting that she never complained of any trouble beyond the embarrassment in her speech. That annoyed her very much.

Q. But you yourself, as a physician, had no way of determining from her speech, or aside from her speech and her appearance and her actions, whether she was demented or not? A. No, and I do not know that anybody else has.

Q. Is it not a fact that dementia is a term employed generally in the medical books, to designate simply a general enfeeblement of all the mental faculties? A. Yes.

Q. That is what dementia is, a general enfeeblement of all the mental faculties? A. Yes.

Q. And that it is also a general weakening of a mind once normal? A. That is going a little too far; it is doing away with the true meaning of the word. It is an abnormal mental condition and a condition of general weakness would hardly cause an abnormal——

Q. It is an abnormal condition? A. It is the result of disease.

Q. It occurs in old people sometimes, does it not? A. I would

not call it a dementia. That would be the result of general senile softening of the brain.

Q. There is such a thing as senile softening of the brain? A. Yes.

369 Q. But it comes from the senility? A. Yes, sir.

Q. And it is not uncommon in people of great age? A. I would not say that.

Q. You would not say it is not uncommon? A. No, because I know of people ninety years old who are as sound mentally as anyone.

Q. Oh, yes, of course. Would you say that a person who was demented had no normal powers of conception? A. Yes.

Q. You would say they had no normal powers of conception? A. Yes, I would say that they had no normal powers of conception.

Q. Is it not a fact that dementia frequently develops in old people as a result of senile involution, and organic changes of the brain incident to that epoch of life? A. There are many cases of that kind. It is not necessarily a condition of old age.

Q. How many persons eighty years of age have you seen, who were defective in sight, whose arteries were sclerotic and who had suffered two attacks of apoplectic embolism of the vessels of the brain, and who have thoroughly recovered their mental powers and died within two years of the stroke?

Mr. LEIGHTON: The question is objected to as having no relation to the case we have under consideration, and the facts assumed do not fit in any wise the condition of Mrs. Magaw, as shown by the evidence.

By Mr. McDIVITT:

Q. The question is, how many persons have you seen in that condition? A. The question is how many cases have I known?

370 Q. Yes how many persons have you ever seen in that condition who thoroughly recovered their mental powers and who died within two years of the stroke? A. I do not call to mind any case.

Q. Have you given the best description you can of your conduct as a physician to this patient, in testing whether she was demented or not? A. I knew that she was not demented, therefore——

Q. Have you given the best description you can? A. Yes, I have already given it.

Q. Did you rely upon the nurse as to bowel movements, and urinary conditions, or did you examine the patient yourself as to those matters? A. I frequently questioned the patient herself, but of course always consulted the attendant also. I examined her urine for the sake of determining whether there was any possibility of kidney trouble in connection with her case.

Q. Why did you rely partly upon what the nurse told you about these matters? A. The nurse was always with her; she was intelligent, interested, and I could always rely upon her word, though I frequently questioned Mrs. Magaw herself. A physician always depends largely upon the testimony of the nurse in such cases.

Q. Well, Mrs. Magaw knew as much about it as the nurse did she not? A. Yes.

Q. Then why did you ask the nurse, when you could ask Mrs. Magaw? A. As a rule I would rather ask a nurse about
371 those kinds of things, than ask a patient who is a lady.

Q. Is that the way you generally do? A. Unless I have reason to suspicion the nurse, and know her to be unintelligent, I generally take her word; but I did not always in this case. It is true that after Mrs. Magaw's first stroke, the first attack of embolism, that a nurse was in attendance upon her all the time, until her death. Before her stroke, she was rather feeble, as any person of her age would be. I do not think any person of the age of eighty-one years needs the attendance of a nurse. I do not know that she was attended by a nurse before her stroke. I do not think that a woman who, prior to the attack of embolism was chaste in her language, and who afterwards used vulgar or obscene language indicates a health- mind, but I never was conscious that she ever did. I am not interested in this case in any way whatever. I am interested in having Mrs. Magaw's condition clearly portrayed on the record but I have not the slightest interest in any way in regard to the issue of the case. I have seen Mrs. Magaw write her name; I do not know that I have ever seen her write continuously. I do not think that I have ever seen her write her name except to checks, and how she wrote them I do not know. I have seen her sign her name on checks. As a rule, she signed them as anybody would sign a check. When she was at her worst, she, once, or twice, made her mark. Once or twice probably, she needed some direction in regard to signing her name. I knew the effect of the aphasia upon her hands was
very slight. A good deal of difficulty in writing came from
372 her eyesight. I think she wrote one or two letters after her
stroke of embolism in 1905, although I did not see them. I recollect that she told me one day that she had written one, but that she was not satisfied with it and I do not know whether she ever signed it or not. I never saw the letter.

Q. I show you Complainant's Exhibit No. 3 filed October 9, 1908, and ask you whether that is a sample of letter written by a person perfectly sane and in a normal state of mind. A. (After examining letter) I would not say it was an evidence of insanity. I would say it showed a lack of power of expression of her thoughts.

Q. I ask you whether that is a sample of a letter written by a person perfectly sane and in a normal state of mind. A. The person might be perfectly sane, but not in a normal state.

Q. Not in a normal state of mind? A. I do not say mind. Mind and power of speech are so different. I should say it was written by a person not having a normal power of expression.

Q. You are avoiding the question. A. I want to avoid it. That is, I do not want to convey an idea in my answer different from that which I entertain.

Q. I do not want you to; but I want a simple answer to my question, and I ask whether this letter shown you is a sample of a letter
written by a person perfectly sane and *and* in a normal state
373 of mind. Simply state is it, or is it not? A. If I should answer that yes, or no, it would intimate that Mrs. Magaw, who

wrote that letter was not in a sane or normal mind. I would not like to say that. I believe she was sane. Her mind possibly might have been weakened by the defects of age, but she was perfectly sane. She lacked the power of expression.

Q. Is that such a letter as you would expect Mrs. Magaw to write, in her condition? A. I never saw a letter from her before, but I would have expected her, probably, to do a little better than that.

Q. You are surprised to find that she did not do any better in this particular instance? A. I am a little surprised.

Q. You are rather surprised at that? A. Yes.

Q. You are not willing to say that this letter is a sample of a letter written by a person who is perfectly sane? A. I am not willing to say that it is a letter written by a person whose entire mental faculties were in a normal condition. I want to keep in my mind the distinction in my reply between a general dementia and that which is the abnormal condition which is connected simply with aphasia, the local condition of the brain.

Q. In answering my question, you are allowing yourself to be influenced largely by what you knew Mrs. Magaw to be, from observation and experience, rather than from the letter itself. A.
374 That is a true state of the case.

Q. And that if Mrs. Magaw wrote this letter, then you think that it does not indicate an abnormal condition of mind, because you know Mrs. Magaw was not abnormal at that time. Is that it? A. That is about the state of the case. I know that she was defective in the power of expression. Beyond that, she was normal.

Q. Was she as defective in the power of expression as this letter indicates? Are you able to answer that question? A. How is that?

Q. I ask you whether she was as defective in the power of expression as this letter indicates she was at the time she wrote it? A. I do not think she was. I would like to explain that that aphasic condition was marked when she undertook to write anything, or to talk in regard to matters in general. She was able to talk about things immediately around her that she was familiar with. She would very often deliver several sentences with hardly a misuse of a word, but when you came to lead her out from the familiar things, she became confused and she regretted it very much, because she could not go into the parlor and talk to those who might be there, in a general way. Sometimes she was rather amused about it and often joked with me because I could not correct that trouble.

Q. What did she say in a joking way; what were her
375 words? A. Sometimes she would tell me, "I am going to get another doctor; you cannot remove this trouble."

Q. Did she use those very words? A. Yes, sir; at times she would say that, with a smile, though.

Q. You mean she did not really mean that? A. Oh, no; it was a joke with her.

Q. Did she use the words as clearly and as sensibly as you do? A. Yes, sir; sometimes she used the words as sensibly as that.

Q. When was this? A. I cannot tell you exactly when; of course, after the trouble. She very frequently indeed joked with me in

that way, about my inability to remove that trouble, and she wanted to know how long it would take, and if I could fix a time.

Q. You did not consider it a joking matter? A. I did not consider the trouble a joking matter but I knew that she was joking when she said that.

Q. She was in a serious condition, was she not? A. I became rather hopeless of ever being able to remove that particular condition.

Q. When did you become hopeless of that? A. I might say within six months of her death, probably just because it persisted in spite of all I could do, in spite of the use of all remedies that I could use, and I thought the persistence of this thing had something to do with determining its seriousness. I expected at
376 first that I would be able to remove the condition. It never occurred to me that as the condition persisted so long that there might have been some slight affection of her mental powers, aside from the aphasia of recollection. I always thought, and I always said to those who were about her, that her condition was no worse than what would be due to her age, aside from the aphasia. That did not affect her brain generally. It did not affect her mentality. That is about all I can say, really. I do not know that that is the letter Mrs. Magaw showed me one time when I was at her house. She did not show me any letter, she told me she had written one. She did not tell me what she wrote about in the letter.

Q. How did she come to tell you she had written a letter? A. I suppose it was just some of those talks about my inability to relieve that trouble. I have never seen any other of her writing. I have seen her sign her name on checks. I cannot tell you the number of speech areas in the brain. I cannot name them to you. They are generally in the third frontal convolution, like the Isle of Reil. As a rule atheroma and arterial sclerosis are synonymous. I have been practicing medicine over twenty years and I am about seventy-eight years of age now.

Q. May I ask what you did before you practiced medicine? A. Most of my time was in the railroad business, railroad superintendence.

377 Q. You were a railroad superintendent? A. Yes sir.

Q. On what railroad? A. I was general superintendent of the Camden & Atlantic Railroad; I was superintendent of transportation of the Mobile & Ohio, and I operated a couple of roads in New Jersey. Their names have changed so that I do not know what they are now.

Q. What did you do immediately previous to your practicing medicine? A. Immediately preceding that, I was in the railroad business. Earlier than that, or while I was superintendent, I was a member of the legislature of New Jersey and speaker of the House. I did not go into the practice of medicine until after I had gotten through with those things, and gotten through with burdens that required me to stick to them.

Q. Were you ever employed in any position in Washington. A. Away back in the early days. I was an engineer in the heating

and ventilating department of the United States Senate for a short time—I do not remember how long. That is the only employment I ever had in Washington.

Q. Where were you employed while you were studying medicine? A. Part of the time I was there, and part of the time I devoted my attention entirely to it.

Q. I thought you said just now you were superintendent of a railroad immediately previous to practicing medicine. A. I said during that time. What I said about it was that while I was superintendent of a railroad I was a member of the New Jersey Legislature and speaker of the House. That is what I said I think.

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Q. Now, what is the fact, Where were you employed previously to your taking up the practice of medicine? A. I was in railroad work.

Q. You have just said you spent part of your time at the Capitol. A. Yes, and a part of that time I was pursuing medical lectures, but not all the time. I devoted myself entirely to the lectures a larger portion of the time.

Q. A portion of what time? A. The larger portion of the time I was studying medicine.

Q. And a part of the time when you were studying medicine, you were employed at the Capitol, here in Washington? A. Yes sir.

Q. What were your duties, there? A. I was in the heating and ventilating department.

Q. Were you not one of the attendants at the Capitol, part of the time? A. Well, I was not the chief engineer, although I did a good deal of the work of a chief engineer.

Q. The Capitol is policed in some way, is it not? A. Yes sir.

Q. Were you a member of the force in any way? A. No.

Q. You had nothing to do with it? A. No.

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Q. While you were engaged in the Capitol, what was your technical position? A. Assistant engineer of the heating and ventilating department.

Q. Did that require any actual labor on your part? A. Yes, some.

Q. You were required to attend there every day? A. Yes sir.

Q. Did it afford you some time to give to your studies? A. Oh, yes.

Q. You studied some in the Capitol while you were employed in that position? A. Yes. Of course, I had my evenings to myself.

Q. How long were you in the Capitol immediately before you started to practice medicine? A. I cannot tell you. Three years, about, I guess.

Q. Is it not a fact that aphasia of recollection is a functional disease, and that very many people are affected by it who are entirely free from any mental disease? A. I think I would say no to that, that is if I got the question right.

The question was repeated by the stenographer as follows:

Q. Is it not a fact that aphasia of recollection is a functional dis-

ease, and that very many people are affected by it who are entirely free from any mental disease?

By Mr. McDivitt:

Q. It is not an organic disease, is it? A. Yes, where it is produced by thrombosis or an embolism.

Q. Then it is organic? A. Yes, it is organic then. If it
380 affects that particular organ, it is not a functional disease, it is an organic disease.

Q. Is it not a fact that embolism to some extent destroys the brain organically? A. I would not say destroys; I would say affects the brain organically.

Q. It changes it organically? A. Yes sir.

Q. Is it not a fact that embolism destroys that part of the area of the brain from which the blood supply is cut off? A. It does not destroy it. It destroys the circulation in that part of the brain and thus leads to its functional derangement.

Q. Is it not an organic derangement? A. The lesion is organic. It affects the function, of course, of that portion of the brain.

Q. Is it not a fact that as long as the area is deprived of its blood supply that that part of the brain is useless as a brain? A. To the extent that its supply is cut off.

Q. You say that those who were closest to Mrs. Magaw were able to understand her better than you were? A. Yes, sir.

Q. Would you say that you were better able to understand her than some others might be? A. Yes, sir.

Q. You are not surprised that a stranger coming in to talk with her might not understand what she meant? A. No; that would be very natural.

381 Q. Would that apply to the last six or eight months of her life? A. Yes sir.

Q. If you were in the room and a stranger should come in and read a letter to Mrs. Magaw about her business affairs what evidence would there be that Mrs. Magaw understood the reading of the letter? A. I do not think there would be any evidence excepting her reply to it, or her expression in some way in reply to it. Anybody might come in and read to a person that was perfectly sane a letter. You might or might not know by observation whether they understood it all and were conscious of its contents or not. There is nothing but observation and the attention to replies that might be made.

Q. You would not think that there was a possibility that she might not have thoroughly understood all of the letter? A. In the case of Mrs. Magaw, a person coming in and reading to her a letter of that kind, I would think that possibly she might not take it in at once, or its significance. She might have to have it repeated to her; it might be required that it should be explained to her; but she was able to comprehend it with that explanation, at any rate. That statement is the result of my opinion and my opinion is the result of observation of her. I know that she had a cataract on both eyes. I think that one of them was very small. She was treated by Dr. Rufus W. King of Washington; he would be able to

give us a clear statement of the condition of her eyes. Mrs.
382 Magaw could not carry on any abstract conversation. By "abstract conversation" I really meant nothing more than the conversation about things that were not immediately about her, things in her room or concerning her special interests or feelings. But in regard to things that pertained to her personally she sometimes could talk without much difficulty. For instance, I talked to her about her going home, going to Brooklyn, and things of that kind, and she was perfectly clear and could talk so that I could understand her without any difficulty at all. Her mind was perfectly clear. I tested the long range of her vision, by her conversation about things in stores across the street. She could recognize persons passing along the street, and saw clearly. I would not say she could recognize some particular person on the street. There never was any person there to recognize whom she knew. She had no difficulty in determining objects in seeing houses or horses, and seeing what was going on in the street. The property she wanted Miss Fague to have was a house. I do not know just what the house was, what number it was. I know it was on Capitol Hill. She said she wanted Miss Fague to have it, as I remember it, she specified that. At any rate, she wanted to make special provision for Miss Fague during her life, and then the property to revert to whomever made up the heirs or whomever she might leave it to. She made that distinction clear to me. She did not want to change her will. She never changed from that opinion, that I know of. I do not, know, though I suppose of course she did not change her will.

But she wanted to know how she could accomplish this with-
383 out disturbing the body of her will. I tried to tell her. I simply told her she could make any provision she wished by a simple codicil to the will without touching the body of the will. I simply told her if she would secure a lawyer in whom she could place confidence he would soon arrange the matter for her; that there would be no difficulty about it. As I understand it a will is an instrument, and if you change it, you must do it, in order to preserve it, by means of a codicil or something independent, attached to or connected with the will already existing. By not touching the body of the will I meant simply without destroying the will, really, or interlining it, or adding to it after the will had been completed. Mrs. Magaw wanted the provisions of that will to stand with the further addition that she might wish to make. That addition was to give a house to Miss Fague during her lifetime and which at her death was to go wherever Mrs. Magaw should provide. That was all she talked about with reference to making a codicil. She did not talk to me about anything else. I cannot tell you exactly when this talk was. Of course it was after her aphasic attack. I do not remember when it was. I should say it was within a year of her death. I think it was within six months of her death, probably within six months. I had treated Mrs. Magaw several years before she was taken with an embolism. I treated her before she came to the La Fetra Hotel. When she was at Mrs. Williams' house. As regards this letter that I saw was written to me by an attorney

in the matter, from Brooklyn, my memory is not clear, as I have said, it was some months ago. Somebody called on me with
384 reference to it, and as I have said already, I am not sure about the receipt of the letter, but I think that I did receive a letter. I do not suppose it had any very particular significance, or probably I would have saved it. It was something about the subject of our previous conversation, about my possible relation with this case. The young man who called on me simply asked me if I was the physician who had attended Mrs. Magaw. The object of the call was to secure me as a witness in the case, and I said I would look up the records to see what Mrs. Magaw's condition was at different times, and then I wrote him a letter stating something about the case. I recollect telling him that after looking over the records I feared that my testimony would not help his side of the case, and that I would be sorry to have him call me and find my testimony was inimical, especially as he said that I would be paid for appearing in the case. I was not to be employed as an expert because I was not an expert. I guess that was thoroughly understood. I told him I would not appear as an expert in any case, especially after what I had observed in the Thaw case in New York. I told him what my impression was, at the time of her condition. I do not know that I said I would look it up. However, I did look it up, and finding that my opinion would be adverse to him, that was why I wrote that letter. That letter I wrote him was called forth by his call and not by a letter from the complainant's attorney. Thrombosis is more common in old age than hemorrhage. From the beginning I had no doubt as to whether Mrs. Magaw's condition was the result of hemorrrage or embolism. It is not a fact
385 that I told Mr. Van Brunt Magaw, her son, that she was suffering from a slight rupture of a blood vessel in the brain. I never told him that. I knew it was not so. My mind was so clear as to what the real condition was that I never could get away from it. In the beginning of the trouble the impression it made upon me was rather that of shock to the system, which depressed all her powers at the time; but she very rapidly recovered from that extreme depressed condition. Her face was rather pale. There were slight respiratory difficulties, no convulsions, none whatever. Referring to the second attack, which has been referred to in the testimony as occurring in April, 1903; upon my examination of Mrs. Magaw I did not observe any drawing of the face. I cannot say that I examined her carefully to see whether that condition existed, for all the examination you would want to make is just to look at her. I looked at her, and could not help but look at her but I found nothing to attract my attention to it. I examined her arms, hands and so forth, enough to assure me that there was no paralysis.

Redirect examination.

By Mr. LEIGHTON:

There is not any mode of ascertaining the size of this blood clot that I speak of excepting the effect of it. The size of a large clot, of

a large vessel, would affect a larger area. That is the only way you can tell. In this case, judging from the effect of the embolus must have been small, covering a very small area of the brain. I spoke of a consultation with my son J. B. Gregg Custis. His place
386 of business is 912 15th Street, Northwest. He practices here. He has practiced twenty-five or thirty years; twenty-five years, I guess, anyhow. I do not recollect when this consultation took place but I think shortly after the attack. Just how it was brought up I do not know, but I suggested to her, and recommended to her that she should go to New York. I think it came through her telling me that her son, or grandchildren wanted her to go. I recommended her to go and told Miss Fague that she had best tell her that she would go with her, and try to persuade her to go. Mrs. Magaw did not desire to go. She seemed to be rather set against going. She gave the reason that she was very comfortable there, that she was so very well satisfied there that she did not know whether she should go; and apart from that she was fearful of the effects of golden-rod, which she said was abundant about her son's house and grounds, and she said that it produced a kind of fever condition. A physician is familiar with general symptoms and recognizes them readily; he knows their significance, as a layman does not. But a layman with keen intelligence and powers of observation could recognize objective symptoms though he would not be so competent to determine their significance. The physician is trained in the observation of symptoms, as a layman is not. This letter marked, "Exhibit No. 3" which has been shown to me is addressed, "My dear friend". Mrs. Magaw did not tell to whom she was writing her letter, not specifically. I do not know what words she used, but I knew it was to the family. I do not recollect when she told me she had written a letter.
387 I do not remember when it was. It was after the aphasic attack but I cannot tell when. She said that she could not write in a way that was satisfactory to her, and she did not send it. She did not tell me what became of it, what was done with it. She did not show it to me. I cannot tell whether this is the letter or not. There is one thing I would like to say. It is in reference to what has been said. I have been rather positive in some things that I have said, and perhaps you have gotten the impression that I am a very interested witness. I do not know what the testimony of others has been. Possibly it may not agree with all I have said. I just want to say this as explaining that: When I first saw her, after this stroke, all those who were about her, Mrs. La Fetra and two or three others that I did not know, supposed she was going to die at once. I was satisfied she would not die, and told them so. Two or three days afterwards Mrs. La Fetra wanted me to call an expert from St. Elizabeth's Asylum, under the impression that she was mentally deranged. I was so positive that that was not the case, that her mentality was not disturbed, that I refused to call anybody from the insane Asylum. There was a suggestion that that would be the place to put her, and I strenuously opposed the thought of anything of that kind, it being a place that was not adapted to her case.

Recross-examination.

By Mr. McDivitt:

I think it was Mrs. La Fetra who suggested that that was the place to put her. I say the difference between the ability of
388 a layman and a physician to determine whether a person was acting as if he was in his right mind or not, is that the physician is trained to observe symptoms, and that being a very careful and necessarily keen observer, he will observe things which might escape the observation of a layman, and you might add further, is better able to judge of the significance of what he observes. In my examination I have told all the symptoms which I, as a physician observed. All that occurred to me. I may have seen some other little things, but they have not occurred to me.

Robert E. Doan, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, testified as follows:

By Mr. Leighton:

My name is Robert E. Doan. I am an attorney, I presume. My home proper is in Ohio, but I have been here since 1890, when I first came to Congress. Judge Anderson and I were partners here. He went to the Bench and I operated in the Departments and in the Court of Claims. I have been a member of the Bar about forty years. Before I came here I was a member of the Bar of the State of Ohio, general practice. I was prosecuting attorney for about nine years; but I was in active practice until 1890. Then I came to Congress. I don't know how to account for being called "Judge," I have temporarily occupied a judicial position. I refused the circuit judgeship to come to Congress, showing my want of sense. I
389 knew Alice D. Magaw in her lifetime, I believe since the latter part of 1901, probably; from that time until the time of her death. I saw her the evening before she died. I boarded at the same hotel with her. I saw her several times a week during the last two years of her life; sometimes I would see her every day; and then for a few days I would not see her I saw her on the 9th day of February (August?) the evening before she died. I took her a bouquet. I will preface a little. My typewriter and stenographer lives in Maryland and goes home every night, and is in the habit of bringing in bouquets. She said she loved flowers, and I would take her a bunch of flowers two or three times a week. I did so on the evening of the 9th. I think she was suffering more or less pain. She thanked me for it, and wanted it set where she could see it. I had very little conversation with her. I did not think she would live twenty-four hours. She had difficulty in getting her breath, but she called me by name and thanked me for the flowers. I did not care to talk with her. I am a witness to the will and codicil of Mrs. Magaw. I recollect distinctly what I said at the time of the attestation of the codicil. I was informed that she had a paper or codicil that she wanted witnesses. In Ohio I had a good deal to do with wills and the probating and settling of wills, and I asked her the questions that I would ask if I was in Ohio. I sat close in front of her. She had a paper. I said, "I understand you have a paper

or will or codicil you want signed or witnessed," she said "Yes." "Well," I said, "Do you understand it?" She said that she did.

"Well," I said "do you want to do it?" She said "Yes." I
390 said, "Mrs. Magaw, is this your free and voluntary act that you want to do this?" She said it was. I said "All right, then I will sign it," and I did. I would ask those questions anywhere when I witnessed a will. It is probably the same here as in Ohio. I don't know. She signed it in my presence and I signed it in her presence. I recollect who was present besides Mrs. Magaw and myself. There was a Miss Lewis, and a gentleman who stood in the rear of her, who I think signed also. I would not know his name; I would not know him if I would see him. If his name were spoken I might fix it by that. It was Mr. Forrest, I think that is right. That was all that transpired at the execution of the codicil. As soon as we all signed in her presence, I said, "Mrs. Magaw, I am in a little hurry." I got up and she nodded her head and I left. I think I left all of them in there. I am not sure about that, but I think so. From that time on until the time of the day before her death I saw her, say, twice a week, maybe more; but I would safely say twice. At the time she signed the codicil I had no doubt of her ability to dispose of her property with sense and judgment, and that is the reason that I asked the questions. In talking to her a few days before—I saw her perhaps twice in a week—I think she understood the object of her bounty and the extent of her property, and I understood her personally to be able to comprehend both. I think she never spoke to me about her purpose of making a will prior to—She never discussed her business matters with me. She never talked very much on business unless it was called out. As far

as I know she was very brief in her conversation, but she
391 weighed her words and when she once said them they meant what she said. During any of the times when I saw her I did not experience any difficulty in understanding what she desired. Towards the last—I do not know how long—sometimes she could not get a word, and I would try to help her out. I would say a word and she would shake her head and say no, and afterwards if I did strike on the word she would say "Yes that is the word." I could not gather it. You could not make her say what she had in her mind unless it was right; but by some means that I do not understand sometimes she just could not get the words she wanted, and she would make motions to get it. That was towards the last. If you gave her the right word she would say, "Yes, that is the word." But unless you gave her the right one she would not agree with it. When she miscalled a word she did seem to appreciate the fact that she had not expressed her thought correctly. She would motion with her hand that that was not correct. Then I would try to help her out, but if I did not get the right word, or if it did not help her any, she would shake her head. Her trouble, so far as I observed, was in her power of expression; that is, over the power of speech, towards the last. I did not observe the difficulty of speech prior to the execution of the codicil. She must have lived five or six months—I believe she died on the 10th of August, and this was

in February. Some little time after that I noticed—not always but occasionally—when I would go to see her, that she could not recall a word.

Cross-examination.

By Mr. McDivitt:

I do not recall that Mrs. Magaw ever talked to me about
392 her property; as to what she had I never knew. I understood—if that is proper—that she did own some properties here. She never said anything to me about what she had. I do not know how old she was at the time the codicil was signed. It would be an indefinite recollection. She must have been somewhere about eighty. She told me once; but I do not remember.

Q. It has been testified here, Judge, that Mrs. Magaw was eighty-three years old, that she had a nurse to attend her night and day for two years before her death, and that she was feeble from age; that Dr. Custis attended her once or twice a week as I understand it; her eye-sight was so poor that she could not see to write, and that she had difficulty in her speech, which the Doctor says persisted from the time she was first stricken in 1905 until her death. You would not think that such a woman was able to make a bargain safely for herself? A. Well, if I did not know her I might agree with you; but I knew her so well that I do not think you could get her to say a thing she did not want to say. It would not make any difference how persistent you were.

(The last question was read to the witness by the stenographer again.)

A. Well, I would say that Mrs. Magaw was. If it were some hypothecated case about which I did not know anything.

Q. Then what? A. But you see I knew her very well.

Q. You say if it were a hypothecated case about which you knew nothing? A. Yes.

393 Q. Then what? A. Then according to the circumstances, I might say yes or no.

Q. You might say either one? A. Yes, I would not know; but in this case I personally knew her a long time. I do not think that Mrs. Magaw at that time, was able to conduct business affairs entirely by herself. I do not think she could run a department store or do general business, but in limited matters in a way—I do not think she was a rich woman—but in her own little matters that she thought over and determined, I would say there would be no question about her ability.

Q. If she had been your mother, would you not have thought it a little safer to attend to matters for her? That is outside matters. A. In that respect I would say, "Mother, you cannot do this," but if she wanted to dispose of some property—my mother was pretty emphatic too, and she would say yes she could manage it herself. I think Mrs. Magaw was competent to make a will at this time, in February, 1905, or I never would have signed it. As a lawyer I understand that there is a difference between the degree of compe-

tency necessary to make a will and a valid contract. A deed pre-supposes a bargain and sale; but a will is merely a statement to give this to my mother or to my brother, etc. That is as I understand it. At least, that is the way I have been arguing in courts in the past. In that view I will be more certain of her competency to make a will than to make a contract, because I have been educated to be-
394 lieve that a contract pre-supposes a bargain and sale, which has two parties to it both of whom are trying to get the better of it. That is, I believe in a proper case a person may be able to make a will and not be able to make a valid contract. My father thought that Mrs. La Fetra and I were third or fourth cousins, but in the book of Doans we cannot connect them in any form. About two years ago, I think, the book was published but father thought we were about third or fourth cousins. I do not recall that I ever heard Mrs. Magaw use the word "promise" in an incoherent way. I have never heard her refer to her will as "Where is my promise?" I have heard her towards the last, when she could not get a word, she would say some things, and then say, "I do not mean that." Then I would try to help her. If I did not give her the right word she would say, "No." When I gave her the right word she would say, "Yes, that is it." She would move her hand or use some expression. I never heard her use the word "promise" or "Blossom" or "earthway" or "Gathway." I have heard her use "spirit." When she was trying to use a word which she could not recall, I have heard her use the word, "spirit." I would say, "Do you mean spirit?" and she would say, "No." But there was always enough said to enable me to supply the word she intended, and then she would say "Yes" but if I could not get it she would move her hand. I think that when she used the word "spirit" she had no reference to a real spirit, she was trying to recall another word. I think I heard her say "running around," and she would move her hand—"running around."
I would say, "Do you mean running over the floor?" She
395 would say, "No." Then if I would recall the right word, she would say, "That is what I mean." I never heard her talk incoherently, except that she could not recall words; and that is a subject I do not know anything about. I did not draw this codicil myself.

I do not know whether she knew I was a lawyer or whether she thought I looked like one. I always treated her as a mother. She did not know whether I was a lawyer, not to my knowledge. She may have known all about it; but I never published it to her or to anybody else. She may have known all about it. I never drew a line or wrote a letter or anything for her. I do not believe I ever heard her laugh loud.

Q. How many transactions involving ten thousand dollars have you been engaged in as attorney, in which the party parting with the ten thousand dollars was in the condition that Mrs. Magaw was in at the time she signed this codicil? A. That would be impossible to say. I represented parties making wills——

Q. Can you tell me how many? A. I believe I have had fifty will cases. I drew a great many once.

Q. You do not understand what I mean. For how many people in Mrs. Magaw's mental and physical condition have you drawn wills? A. I drew several where they were unable to talk aloud, and you would have to get down close to understand what they said.

Q. Were you able to understand what they said? A. Yes,
396 by getting close. One or two of them died the *the* next day.

Q. If you had drawn this codicil, you would not have drawn it as it was? A. I have never heard it read, and do not know what it contains.

Q. You do not know what it contains? A. No; I know in a general way.

Q. You have never heard what she wanted to do with this property? A. No. I understood she was giving it to some mission society. I did not ask. I only inquired if she understood what she was signing.

Mrs. ALBERTUS MCCREARY, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, testified as follows:

By Mr. LEIGHTON:

I am a married woman. My name is Emma. I knew Mrs. Alice D. Magaw in her lifetime. I don't know anything about time. I went to Mrs. La Fetra's and knew her there as a guest in the hotel from the time I went there until I left, a little over four years that I was there in the hotel and I met her afterwards. I left the hotel, as near as I can recollect, the very first of May in—I don't remember the year. I can't recollect those things. We went there on the 26th day of August the year of the Buffalo Fair, 1901.

I remember exactly the day of the month, because it was my birth-
day. That is the reason I can remember the day. We stayed
397 there four years, and until the 1st of May of the fifth year,
1906. After I left there I saw Mrs. Magaw. I can't swear that I saw her more than once. I can't say how long before her death I saw her. I am not so certain as to that. It was in the year of her death. I can't remember whether it was just the warm springtime or into the summer. It was in the warm weather. It was not in the winter. I could not tell you how long I was with her. It was a short call—not an hour. My little grand-daughter was with me and her nurse was there when I entered. In a few minutes the nurse passed out of the room, I remained there for something within an hour. I don't remember just exactly. I could not tell. I am no judge of time, but it was something like that. During the whole of that time I conversed with Mrs. Magaw. She conversed with me. As near as I can recollect she talked to me and I talked with her. I don't recall any of the subjects of our conversation. I never had any difficulty in understanding what Mrs. Magaw tried to say. I observed no trouble whatever with respect to her speech. With the exception of her misusing words at the last, "I am going" in speaking about when I rose to go. She made some remark like "Are you going?" meaning home or something of the kind. I don't know

what she meant. She meant, of course, "Are you going home" or "Are you going to your dinner?" I don't know. She just misused a word in that connection. That is all—misused a word; spoke the word plainly but misused it. She did not appear to be conscious of the fact that she had miscalled it, perfectly unconscious of it. I saw no difference in her manner and the character of her conversation from what it was when I first knew her in the earlier
398 days. I saw no difference in it. She never was a great talker at any time. She was decidedly an intelligent woman. I remember her being ill, having heard of it in the hotel, but I did not see her. I saw her after she got about, after that trouble. It is hard for me to say how frequently I was accustomed to see her until I left the hotel. You see a person more or less frequently in a hotel—in the elevator and passing around the rooms and at the table. I could not say whether it was once or twice or a dozen times or three dozen times. It is impossible for me to answer that. I conversed with her just as much as I was in the habit of conversing with her. I observed no difference in the character of her conversation. I did not come here voluntarily—emphatically. I insisted on being summoned and being paid as a witness to testify. I have a decided objection to foreign missions. That is not the only reason, but that is the principal reason.

Cross-examination.

By Mr. McDivitt:

Q. You think the Magaw family have enough without this money? A. No, I don't think so; not at all; no; no, I don't think that.

Q. You do not know how much they got? A. I have not the faintest idea. It is immaterial to me. They are strangers to me. I have seen them. I saw several members of the family. I want to make it appear that I am so anxious not to testify here be-
399 cause my sympathies are not on this side. I never told you that my sympathies were on this side. If you got it from anything I said you certainly made a dire mistake. I did not tell you that the Magaw family had enough money, and that I wanted this thing to stand. I do not want it to stand. I prefer not to say why, other than to say I object to foreign missions. I don't think it is necessary for me to discuss my feelings about foreign missions. I don't know that Mrs. La Fetra has testified in this proceeding, I suppose so: but I am not aware of it. I would not swear that anything Mrs. La Fetra said about Mrs. Magaw's condition is true, I don't know anything about that. I only know what I am swearing to—her condition as far as I know anything about it. Mrs. La Fetra was very much nearer to her and saw her a great many more times than I did. I don't know what Mrs. La Fetra said, nor what she is likely to say. I am very sure in my own mind that I do not want this transaction to stand as it is with one exception. I have a great deal of sympathy for Miss Fague, and if I had been in Mrs. Magaw's place, or could do anything myself, I would be glad to do

it. I consider her a person who would excite one's sympathy and interest. With the exception of that, I really feel as though I did not want it to stand. I mean that my knowledge and my sympathy for Miss Fague make me feel that I would not want to take away from Miss Fague anything she would be entitled to. Anything I could give her I would be glad to.

400 Mrs. AMELIA E. HUNTLEY, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, testified as follows:

By Mr. LEIGHTON:

I am married. My husband's name is Rev. E. D. Huntley. I am one of the defendants in this case. I knew Mrs. Alice D. Magaw in her lifetime. I knew her by name since 1902, and personally, about two years prior to her death. I am corresponding secretary of what we call the Baltimore Branch of the Methodist Church. A part of my work is the care of bequests, annuities and special works supported by individuals or auxiliaries. I am a general officer. I last saw Mrs. Magaw, I should say about three months before she died. I am not very good at dates, but it was in the warm weather—in early spring, I should say. I went to her house. I saw her in her room. A lady was present that was a stranger to me. I was introduced, but I don't remember her name—and Miss Lewis. She remained possibly twenty minutes. I conversed with Mrs. Magaw. She talked with me. The next time before that that I saw Mrs. Magaw was at a gathering of possibly twenty ladies in the parlor of the La Fetra, at a meeting, a regular monthly meeting of some kind. I am not able to fix dates for anything, and the only reason I am enabled to recall the date of my first knowing her is because of a record I have here in my hands. I am sorry I am not able to—It was during the last year of her life. I am not able to state whether or not it was after the winter had passed of that year, I cannot say. Those were the only two times I saw her during the
401 last year of her illness. I do not recall the circumstances of her first attack in 1905—her illness of that date. I did not see her very frequently between the year of 1902 and the last year of her life. It was my work to see that anyone that supported special work should get their letters, and occasionally I would take to her the letter of which she was the recipient. So I have no record at all, as I do not keep any records of when I distribute letters. I recall the subject of my conversation the last time I saw her. The one thing that she was interested in was that—Well, let me see if I can be exact. "I want my Bible women to be taken care of." That is one thing she said. She was supporting two Bible women, one in Dwarohat, India, and one in Foo Chow, China. She had been supporting them before I took the work and I have the record in which her name appears, that she was supporting the work in 1902, and from that time on my record shows that she did. This is my first experience in this kind of a case. We talked of the ordinary things of the day and some church matters, and I said I was glad to see her fairly well, and that her work was being cared for. Those were

the lines of our conversation. I had no reason to remember anything special. I think the first intimation that I had of the execution of this deed, which is the subject of this controversy, was what appeared in the paper—the deed.

Q. When did you first ascertain about the codicil to Mrs. Magaw's will? A. I did not know that there was a codicil. I only
402 knew that she was going to give something to the Women's Foreign Missionary Society. She did not discuss the matter with me at all prior to the making of either of these instruments. The last time I saw Mrs. Magaw I understood perfectly what she wished to say. She would occasionally lose a word. I did not discover that she appeared to be conscious of the fact that she had miscalled a word, or could not speak the right word because she used the right word before she finished. During the next time prior to this—at that public meeting I had conversation with her.

Q. What was her condition at that time as to speech, or her ability to make herself understood or expressing what she desired to say? A. I understood what she wished to say.

Q. Did she participate, in a general way, in the conversation, or do you recollect? A. There was not much chance for that. It was more in the shape of a meeting and she signified her approval and her joy. She indicated it by her looks, as well as by a word occasionally. She was a quiet woman; so we did not have much demonstration. She did not converse with me at any time on business affairs, or about her family.

Q. How did her mental condition the last time you saw her compare with what it was in the previous years prior to 1905? A. I discovered no difference, except, as I said, on occasional lapse of a word, and I could understand her as well then as the first time I saw her.

Q. Did you discover any failure of her mental grasp or
403 ability to follow a thought, between the times? A. I should say no. My subjects of conversation with her were very limited, because I am a woman of one thought these days. So my talk was all along one line.

Q. When you visited her, you usually discussed subjects relating to your work? A. Yes; I knew she was interested in it. I usually try to touch on the subject that people are interested in, when I call on them.

Q. State whether or not, Mrs. Magaw, was, in your judgment, the last time you saw her capable of making a valid deed or contract?

Mr. McDivitt: I object to this, on the ground that the witness is not qualified to give an opinion as to the competency of Mrs. Magaw.

A. I do.

By Mr. Leighton:

In the course of her speech during the last two occasions on which I saw her, she very infrequently hesitated for a word.

Cross-examination.

By Mr. McDivitt:

Mrs. Magaw talked very slowly when she talked, and carefully, I should possibly say she did. I don't quite remember. I don't think there was any change from the first time I saw her until the last. My memory for details is very good in some things. It depends on what it is. If I had expected that I was going to be asked
questions of this kind, I presume I should have been very
404 keen to observe it. I mean that my memory is not so good
about these details, relating to Mrs. Magaw's actions and words, as it would have been if I had known I was going to testify about them. I saw Mrs. Magaw last during the last year, I saw her twice that I remember positively. The last time I saw her may have been one of the two times that I have in mind—one was at that meeting, and the other was in her room. I am unable to state which of the two times was the last. They were the two last times. They were both within a year of her death. One was when Miss Lewis was her companion, I don't know which one that was—when I was in her room.

I can't state whether the meeting was before that. I cannot be sure of that. Mrs. Tilton was there. A woman who goes to as many meetings as I do would not be able to say that Mrs. Tilton at that particular meeting, gave a map talk. I attend a great many meetings, I would be at one this minute, were it not for my being here for this purpose. I don't seem to be doing much else than attending meetings except occasionally looking after my husband. I may be able to recall the whole of that meeting if I could only get hold of a single thread. It was a public meeting of some sort that Mrs. Magaw attended and that I attended. I think the presiding officer was Mrs. Holmes. I cannot recall whether Mrs. Tilton, on that occasion gave a map talk on the Islands of the Sea. Mrs. Tilton gave a great many talks, and they relate to many places. During the winter the subject would be about the same, you know; the next year it would be something else. Really, I don't know
whether it was the Islands of the Sea. It may have been
405 Japan. I think it would perhaps come under that, but I
don't know. We have had some seven years' study on the different countries, and Mrs. Tilton is a woman that always prepared herself on all of them. I have heard her on every one of the subjects. I am interested in this suit. I am one of the parties of the suit, interested as an Officer of the Women's Foreign Missionary Society. I am interested in having the money go where Mrs. Magaw wished it to go. I think Mrs. La Fetra told me that Mrs. Magaw was going to do something for the foreign missions. I think she was the natural one to do it. I think she told me because I was one of the officers who always attend to those matters. I presume she mentioned the fact that Mrs. Magaw was going to make me one of the trustees, but I do not know; I can't say. I know this, that as an officer, I frequently have those things come to me, and I pay very little attention to them until something culminates. I knew Mrs. Magaw was ill. I do not know that she had a stroke of paraly-

sis. I do not know that I knew that. I heard that she was ill—seriously ill, at that time, and that she had a nurse. I did not notice any difference in her, from the time prior to 1905 up to the time of her death, except, perhaps, a weakness that comes with old age. I will not say that I thought she could swing dumb bells at the end of five years, at her age. I knew that she was not a well woman. She had a nurse. I did not think the nurse was there for nothing. It never occurred to me that it was foolish to keep the nurse there. A great many people have companions and nurses, even if they are not incapacitated. I do not think that I
406 ever heard anything of Mrs. Magaw's financial condition. I only know that she gave liberally during my administration of the special work affairs. I could not state the date of her last donation. I could if I could refer to my books. Possibly the last of March or April. It depends upon how near Easter it was. I should say the last donation was about Easter. Her other gifts were usually paid in the early part of the year. If I had no interest whatever in any kind of missions, I think my feeling towards this case would not be different, from what it is now. I think it would be the same. I should wish that her wishes be complied with, that is what I believe she wished done.

Q. And yet she never spoke to you? A. Well, I knew her well enough to know that she knew what she wanted.

Q. You never knew that she wanted to do what she did do? A. Well, no; she never conversed with me regarding the special gifts, except her special work. In my conversation with Mrs. Magaw, I never had any difficulty in understanding what she meant. I cannot tell how many times I saw her in the last two years of her life. I only saw her twice during the last year, I think, as I have told you. I could not tell at all how many times in the year before that, possibly several times. She knew me fairly well. She knew of me. I am not a woman that does very much social calling. I am a business woman purely; so I don't have much time for social calls. Possibly, I would not have come in touch with her at all, except for the fact that I had her letters that came to her; and they only
407 came once a year. In talking with her I never thought for a moment that there was any doubt that I understood her and she understood me. It never occurred to me that there was any question about her meaning. I never doubted that she was able to grasp my meaning.

Q. You say you noticed that Mrs. Magaw was ill. What did you think was the matter with her? A. Did I say I thought she was ill?

Q. Yes; you knew that she was not well. A. Well, I heard that she was not well.

Q. What did you think was the matter with her? A. I did not think anything about it.

Q. You did not know? A. No.

Q. You do not know anything about it? A. Why yes; on general principles, just as we hear of many people who are ill; but I do not remember that I went into particulars.

Q. Now, I am asking you whether you knew what was the matter with her, or whether you had been told what was the matter with her? A. I don't know that I can answer that, because I would not like to say that I had been told. I would not like to say that I conversed with her and was able to discover what was the matter with her, because I have not been able to discover it by conversing with her.

Q. You know whether you knew at that time whether she was sick and what was the matter with her, or whether you did not know?

A. I never saw her when she was in bed. I saw her only
408 when she was up and around. She was not confined to her bed at that time.

Q. Do you understand what I mean? I am asking you whether you had any information as to what Mrs. Magaw's trouble was? *Q.* Oh, on general principles, I should say probably I did.

Q. Probably you did? A. Probably I was informed.

Q. Yes; but you do not know that you were informed? A. I do not remember any special ailment that she told me.

Q. And from talking with her, you did not discover that there was any ailment? A. I did not.

Q. So far as you observed, she acted as any well woman of her age would act? A. Yes, sir. I think so.

Redirect examination.

By Mr. LEIGHTON:

I have had experience with people who were not always able to select the word they desired to use, aged people. My own father was eighty-four years old when she died, and during the last two years of his life he was not always able to designate that article that he wished. He would say, "I wish a spoon", when he wanted a fork. Then he would say "No" when you handed it to him. Then I would see that it was not what he wished, and when I would hand
409 him a fork, father would say "yes". And little things like that I saw in my father's own case. The condition of Mrs. Magaw impressed me similarly as that of my father. I should say it was a case similar to that; but I perfectly understood her.

HELEN A. SNELL, a witness of lawful age, called by and on behalf of the defendants having been first duly sworn, testified as follows:

By Mr. LEIGHTON:

My name is Helen A. Snell. I am single. I am a deaconess. I knew Mrs. Alice D. Magaw in her lifetime. It was in the winter of 1905, that I first knew her and from thence on until the time of her death. I did not board in the same hotel with her. From the winter of 1905, up to the time of her death, I saw her about every two or three weeks. I cannot tell exactly. The last time I saw her was either the last of May or the first of June before she died. The next time before that was two or three weeks before. I simply called as a friend. At the times of my visits, we always used to talk about her flowers, and I knew two or three of her friends here in the city—

and the church work. We often used to speak of Mrs. La Fetra. I occasionally read to her. The last time I saw her, I was with her possibly an hour. I recollect the subjects of our conversation during that visit. I remember one. I remember the pretty little tea gown she had on. I remember speaking of that. I never knew anything of the execution of this deed which is the subject of this controversy, nor of the codicil to her will. She never discussed with me
410 either of these things. She never talked with me about her business affairs. During the last interview I had with Mrs. Magaw, I did not read to her. I did not, at that time, have any difficulty in understanding what she desired to say. In conversation with her, I think I had no difficulty in understanding what she had to say during any of the period of my acquaintance with her. As a rule, I could understand her. Sometimes, it was hard at first to understand, but I always understood after a time what she wanted to tell me. I thought toward the last year or two that she talked somewhat better than she did after her illness of August, 1905. I won't say her powers of speech came back to her largely, I say I understood her better. Perhaps that was because I was better acquainted with her. Mrs. Magaw always manifested knowledge of the fact when she miscalled a word, it annoyed her apparently. During some of the times that I saw her, she did so far as I could discern, understand what she desired to communicate. I don't think I can tell what her difficulty in conversing was. I just remember one incident. I think she always called Captain Forrest her "sunbeam" or something like that; I have forgotten just the word. "Sunbeam" or "sunshine"; I don't know just what it was—her "Promise" or something like that. From the subject of her conversation, I would know whom she meant. From what I saw of Mrs. Magaw she was a woman of great intelligence.

Q. Was she, in your judgment, at the time you last saw her capable of making a valid contract?

Mr. McDivitt: I object to that, on the ground that this witness is not qualified to give an opinion as to Mrs. Magaw's com-
411 petency at the time specified.

Mr. Leighton:

Q. You may answer? A. What is it?

Q. Did you think she was capable of making a valid deed or contract; I mean mentally capable of understanding the nature of a transaction of that sort? A. I should think so.

Cross-examination.

By Mr. McDivitt:

I said that there always was difficulty in understanding her at first, but by talking to her I was able to understand her. That difficulty was simply that she used these words, as in speaking of her "promise", or—well, on different days that I saw her she would seem to have a different word; that is, in using the noun she would sometimes use the same word on different days, as "promise" one day and

"sunshine" perhaps another day. She sometimes used the word "spirit", I remember her using that word. I never heard her use the word "earthway" or "pathway". Of course I would not say that her method of talking was perfectly natural; I would say that she was afflicted in some way, not articulating words, I would call that an affliction. I took an interest in Mrs. Magaw, and tried to cheer and please her and read to her occasionally.

412 COMPLAINANT'S EXHIBITS NOS. 1 TO 58.

List of Checks.

Date.	Amount.	Payee.	Endorsement on face of checks.
Aug. 16, 1905.	$21.00	E. S. La Fetra.....	(P. T.) (American Security and Trust Company. Paid Aug. 18, 1905.)
July 1st, 1907.	80.94	Sarah D. La Fetra..	(P. T.)
July 1st, 1907.	50.00	Dr. George W. N. Custis.	(American Security and Trust Company Paid July 3, 1907.)
June 17, 1907.	74.94	Sarah D. La Fetra..	(American Security and Trust Company. Paid Jun- 19, 1907.)
May 31st, 1907.	62.50	Sarah D. La Fetra..	(American Security and Trust Company. Paid Jun- 1, 1907.) Night.
May 31st, 1907.	94.30	E. S. La Fetra.....	(American Security and Trust Company. Paid Jun- 1, 1907.)
May 24th, 1907.	131.25	E. G. Davis, Collector of Taxes; The District of Columbia.	(American Security and Trust Company. Paid May 28, 1907.)
May 13th, 1907.	65.65	E. S. La Fetra.....	(American Security and Trust Company. Paid May 14, 1907. Night.)
413			
April 29, 1907.	64.30	E. S. La Fetra.....	(American Security and Trust Company. Paid Apr. 30, 1907.) Night.
April 22, 1907.	88.70	E. S. La Fetra.....	(American Security and Trust Company. Paid Apr. 23, 1907.)
April 9th, 1907.	68.34	E. S. La Fetra.....	(American Security and Trust Company. Paid Apr., 1907. Night.) Cut in error. J. S.
March 30th, 1907.	32.00	George W. N. Custis.	(American Security and Trust Company. Paid Apr. 2, 1907.)
March 15, 1907.	38.00	Mrs. J. Finney Engle.	(American Security and Trust Company.) Paid M'ch 24, '07.
March 11th, 1907.	73.34	E. S. La Fetra.....	(American Security and Trust Company. Paid Mar. 12, 1907.)
Feb'y 25, 1907.	66.50	E. S. La Fetra.....	(American Security and Trust Company. Paid Feb. 26, 1907.)
Feb'y 11th, 1907.	65.19	E. S. La Fetra.....	(Paid Feb. 12, 1907. Trust Company. Night.)
Jan. 28th, 1907.	59.40	E. S. La Fetra.....	(American Security and Trust Company. Paid Jan. 29, 1907. Night.)

	Date.	Amount.	Payee.	Endorsement on face of checks.
Jan.	3rd, 1907.	30.00	Dr. George W. N. Custis.	
Dec.	31st, 1907.	59.00	E. S. La Fetra.....	
Dec.	17, 1906.	67.69	E. S. La Fetra.....	(R. T.) (P. T.) Paid.
414				
Dec.	4, 1906.	72.00	E. S. La Fetra.....	(P. T.) Paid.
Nov.	20th, 1906.	94.94	E. S. La Fetra.....	(R. T.) Security. Paid Nov. 21, 1906.)
Nov.	5, 1906.	75.05	E. S. La Fetra.....	(R. T.) American Security and Trust Company. Paid Nov. 8, 1906.)
Oct.	8th, 1906.	89.25	E. S. La Fetra.....	(American Security and Trust Company. Paid Oct. 10, 1906. (R. T.)
Oct.	22nd, 1906.	61.94	E. S. La Fetra.	(American Security and Trust Company. Paid Oct. 29, 1906)
Sept.	24th, 1906.	70.04	E. S. La Fetra.....	(American Security and Trust Company. Paid Sep. 25, 1906.)
Sept.	17, 1906.	34.00	George W. N. Custis.	Paid.
Sept.	10th, 1906.	73.69	E. S. La Fetra.....	Paid.
Aug.	27, 1906.	67.44	E. S. La Fetra.....	(R. T.) Paid.
Aug.	13, 1906.	65.65	E. S. La Fetra.....	(R. T.) Paid.
July	30, 1906.	62.24	E. S. La Fetra.....	(Endorsement illegible.) (R. T.)
July	17, 1906.	66.05	E. S. La Fetra.....	(American Security and Trust Company. Paid Jul- 18, 1906.) (R. T.)
July	2nd, 1906.	46.00	Geo. W. N. Custis..	Paid.
July	2nd, 190–.	108.79	E. S. La Fetra.....	(R. T.) Paid.
June	19, 1906.	65.19	E. S. La Fetra.....	(American Security and Trust Company. Paid Jun- 20, 1906.) (R. T.)
June	4, 1906.	66.75	E. S. La Fetra.....	(R. T.) Paid.
May	22nd, 1906.	69.74	E. S. La Fetra.....	(P. T.) Paid.
415				
May	8th, 1906.	62.85	E. S. La Fetra.....	(P. T.) (R. T.) Paid.
April	24, 1906.	74.94	E. S. La Fetra.....	(American Security and Trust Company. Paid Apr. 25, 1906.) (R. T.)
April	16, 1906.	200.00	Mrs. S. D. La Fetra.	(American Security and Trust Company. Paid Apr. 18, 1906. (R. T.)
April	10th, 1906.	67.90	E. S. La Fetra.....	(R. T.) (American Security and Trust Company. Paid Apr. 12, 1906.
April	3, 1906.	70.00	Dr. George W. N. Custis.	Paid.
March	26, 1906.	50.44	E. S. La Fetra.....	(R. T.) (American Security and Trust Company. Paid Mar. 27, 1906.)
March	12, 1906.	50.55	E. S. La Fetra.....	(Security Company. Paid Mar. 13, 1906. (R. T)
Feb'y	28th, 1906.	5.00	Wm. Rufus King, M D.	(Paid.) American Security. Paid Mar. 7, 1906.
		57.24	E. S. La Fetra.....	(R. T.) (Endorsement illegible.) (Paid.)
Feb'y	13, 1906.	47.75	E. S. La Fetra.....	(American Se. and Trust Company. Paid Feb. 14, 1906.)
Jan.	30, 1906.	46.99	E. S. La Fetra.....	(American Security and Trust Company. Paid Jan. 31, 1906.) (R. T.)

Date.	Amount.	Payee.	Endorsement on face of checks.
Jan. 20, 1906.	50.00	B. H. Stinemetz & Sons Co.	(American Security and Trust Company. Paid Jan. 22, 1906.)
416			
Jan. 19, 1906.	39.50	E. S. La Fetra.....	(American Security and Trust Company. Paid Jan. 22, 1906.) (R. T.)
Jan. 9, 1906.	20.25	E. S. La Fetra	(R. T.) Paid.
Jan. 5th, 1906.	47.45	E. S. La Fetra.....	(P. T.) Paid.
Dec. 21, 1905.	64.05	E S. La Fetra.....	(R. T.) Paid.
Dec. 6, 1905.	60.00	Mrs. J F. Engle...	(P. T.) Paid.
Dec. 5, 1905.	49.25	E. S. La Fetra.....	(American Security and Trust Company. Paid Dec. 6, 1905.) (R. T.)
Nov. 24, 1905.	47.85	E. S. La Fetra.....	(Endorsement illegible.) Paid.
March 25, 1907.	65.05	E. S. La Fetra.....	(American Security and Trust Company. Paid Mar. 26, 1907.)

417 COMPLAINANT'S EXHIBIT No. 59.

In the name of God, amen, I, Alice D. Magaw of the City of Washington in the District of Columbia, (widow of Robert Magaw late of the town of Flatlands, Kings County, New York), being of sound mind and memory, but considering the uncertainty of this life, do therefore make, ordain, publish and declare this to be my Last Will and Testament, that is to say:—

First. I order and direct my executors hereinafter named to pay all my lawful debts and funeral expenses (including a suitable headstone to be erected by them at my grave) and all expenses for my board or sickness as soon after my decease as may be practicable.

Second. I give and bequeath unto my sister Antoinette Davenport residing at Bethlehem, Pennsylvania, all my household furniture and clothing.

Third. I give and bequeath unto my grandson, Robert Magaw the sum of three thousand dollars in honor of his grandfather's name.

Fourth. I give and bequeath unto Miss Anna M. Wyckoff the daughter of Van Brunt Wyckoff, formerly of the City of Brooklyn, New York, the sum of Two hundred dollars.

Fifth. I give and bequeath unto Mrs. Adrianna Martin, widow of Geo-ge Martin, residing in the City of Brooklyn, Kings County, New York, the sum of Two hundred dollars.

Sixth. I give and bequeath unto my sister Antoinette Davenport the interest or income of the sum of Two thousand dollars for and during the term of her natural life or so long as she shall re-
418 main unmarried, and I hereby direct my executors to hold and invest the said sum of Two thousand dollars in trust for that purpose, and after her marriage or death the said principal sum of Two thousand dollars shall form a part of my residue estate, and shall be disposed of as indicated in the residuary clause of this my Will.

Seventh. I give, devise and bequeath all the rest, residue and remainder of my estate both real and personal and whereever situated, which I shall own or be entitled to at the time of my decease to my

two sons Van Brunt Magaw and John D. Magaw both of the said Town of Flatlands, and to the survivor of them and to such one of them as shall duly qualify as executor of this my Will with power to receive the rents, issues, profits, interest and income thereof, and hereby give them the legal title of said estates in trust however for the following uses and purposes, that is to say, to sell and convert the same into money either at public auction or private sale, and upon such terms as they deem best, and to execute, acknowledge and deliver good and sufficient deeds to the purchaser or purchasers thereof, and out of the proceeds of such sale or sales I direct them my said executors and trustees to pay all my lawful debts and other legal charges against my estate and the several legacies hereinbefore mentioned, and out of the balance of such proceeds to pay to my said sons Van Brunt Magaw and John D. Magaw each an equal third part of such proceeds, and as to the remaining one third part of such proceeds to invest the same and pay over the interest or in-
419 come thereof to my son Frederick L. Magaw for and during the term of his natural life, and from and immediately after the death of my said son Frederick L. Magaw, to pay the principal of such remaining one third of such proceeds to the child or children of the said Frederick L. Magaw if he shall leave any lawful child or children him surviving and in equal parts if he shall leave more than one child, and in case he shall leave no lawful child or children him surviving, I then give and bequeath the said remaining one third of such proceeds after the death of my son Frederick L. Magaw to my said sons Van Brunt Magaw and John D. Magaw in equal parts, share and share alike.

Eighth. It is my will that no devise or bequest herein made by me in favor of my said sons Van Brunt Magaw, John D. Magaw or Frederick L. Magaw, shall fail or lapse by reason of the death of either of them before my decease, but the share or shares of the ones so dying shall pass to their several next of kin according to the Laws of the State of New York, in the same manner as if they had survived me, and become vested with the same and had then died intestate.

Ninth. It is my will that all investments which shall be made by said executors shall be either upon bonds secured by first mortgages on real property in the State of New York, or by depositing the same in some reliable Savings Bank or Banks in the City of Brooklyn, and for the best rate of interest which they can legally obtain.

Tenth. I order and direct that my said executors and trustees shall not be required to give any security for the faithful performance of their duties under this my will and that only those
420 who qualify as executors of this my will shall act as trustees thereunder.

In case of the death or refusal to act of both of my said executors and trustees I direct that the same power, discretion and trust and title to my estates as is herein reposed in them shall also vest in such trustee or trustees as may hereafter be appointed by any court of competent jurisdiction in order to carry out the terms and provisions of this my will, provided such trustee or trustees shall duly qualify.

Eleventh. I hereby make, constitute and appoint my two sons the said Van Brunt Magaw and John D. Magaw, both of the Town of

Flatlands, Kings County, New York, and the survivor of them to be executors and trustees of this my last will and testament, hereby revoking and declaring null and void all former wills by me at any time heretofore made.

In witness whereof I have hereunto set my hand and affixed my seal this 24th day of September, 1895.

ALICE D. MAGAW. [SEAL.]

Signed, sealed, published and declared by the said Alice D. Magaw the above named testatrix as and for her last Will and Testament in the presence of each of us who at her request and in her presence and in the presence of each other have hereunto subscribed our names as witnesses at the end of the Will, this attestation clause having been read aloud in the presence and hearing of the said testatrix immediately previous to our signing the same. The word "law-
421 ful" in the last line of Page 2 and on the second line of Page 3 interlined before execution.

JOSEPH ASPINWALL,
Residing at 741 Lafayette Ave., Brooklyn, N. Y.
FRANCIS STOCKTON McDIVITT,
Residing at 41 Chauncey Street, Brooklyn, N. Y.
J. HUNTER LACK,
Residing at No. 242 Warren Street, Brooklyn.
EDGAR BERGEN,
Residing at 67 Lenox Road, Brooklyn, N. Y.

WASHINGTON, D. C., *February 21st,* 1907.

Whereas, I, Alice D. Magaw, of the City of Washington, District of Columbia, did on or about the 24th day of September Eighteen hundred and Ninety Five make my last Will and Testament of that date, do hereby declare this to be a codicil to the same.

First, I hereby ratify and confirm said Will in every respect save so far as any part of it is inconsistent with this codicil.

Second, I give hereby the use of Lot No. 19 in Square No. 758, and known as house No. 207 B Street N. E. Washington D. C. to Hettie H. Fague, of the same place during her lifetime; and at her death when the same shall pass to the trust created in the third paragraph of this codicil for the same purpose and effect.

Third, It is my Will and bequest to give to Amelia E.
422 Huntley, Lydia H. Tilton, and Hettie H. Fague as Trustees for the Womans Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of the City of Washington, D. C., in trust, lots numbered 20 and 21 in Square 758 and known as 209 and 211 B Street N. E. Washington D. C. with the authority to take control of, to sell and convey the said property: the proceeds realized to be used towards the erection of a Memorial to my departed husband Robert Magaw, and myself, either in China or India, the place of location and character of memorial to be decided by the society.

In witness whereof, I have hereunto set my hand and seal this 21st day of February, A. D. 1907.

ALICE D. MAGAW. [SEAL.]

The foregoing instrument was at the date hereof, by the said Alice D. Magaw, signed, sealed and published as and declared to be her last will and Testament, in presence of us, who at her request, and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

ROBT. E. DOAN,
KATIE A. LEWIS,
C. M. FORREST.

Supreme Court of the District of Columbia, Holding Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, Wm. C. Taylor, Deputy Register of Wills for the District
423 of Columbia, Clerk of the Probate Court Do Hereby Certify,
That the foregoing are true copies of the original paper writings purporting to be the last will and testament and codicil of Alice D. Magaw, deceased — filed in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court, in the matter of the estate of Alice D. Magaw, deceased — Case No. 14,639 — Adm. Doc. 37 —.

I further certify, That I have compared said copies with the original papers in said office, and find them to be full true and correct transcripts thereof.

Witness my hand and the seal of the said Probate Court, this 1st day of July A. D. 1908.

[SEAL.]

W. C. TAYLOR,
Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court.

424 COMPLAINANT'S EXHIBIT NO. 60.

This indenture, made this 28th day of May in the year of our Lord one thousand and nine hundred and seven, by and between Alice D. Magaw, widow, of the City of Washington, District of Columbia, party of the first part, and Amelia E. Huntley, Lydia H. Tilton, and Hettie H. Fague, Trustees, of the same place, parties of the second part:

Witnesseth, that the said party of the first part for and in consideration of the sum of Ten dollars to her in hand paid by the said parties of the second part at and before the sealing and delivery of these presents, does grant unto the parties of the second part, their heirs and assigns as joint tenants, all those pieces or parcels of land situate in the City of Washington, District of Columbia, known as and being lots numbered Twenty (20) and Twenty-One (21) in John G. Ames and R. A. Morrison's Subdivision of part of Square Seven Hundred Fifty-eight (758), as per plat recorded in Book 13, folio 46, one of the records of the surveyor's office of the District of Columbia, together with the improvements, rights, privileges, and appurtenances to the same belonging.

To have and to hold the same unto the use of the said parties

of the second part, their heirs and assigns, as joint tenants, in and upon the following trusts, and none other, to wit:

First, in trust to permit the said party of the first part
425 and her assigns to use, occupy and enjoy the hereinbefore described real estate and the rents, issues and profits thereof to have and to take to and for her own use and benefit for and during the term of her natural life and to enjoy the same during said period as fully and freely as though this conveyance had not been executed.

Second. And upon this further trust, that upon the death of the said party of the first part, to sell the hereinbefore described real estate either at public or private sale, in the *direction* of said trustees, or the survivor of them, upon such terms and conditions, and if at public sale after such previous notice and advertisement as they, or the survivor of them, or the trustee acting in the execution of this trust, may deem best calculated to accomplish the purpose of this trust, and to convey the same to the purchaser or purchasers by good and sufficient deed in fee simple. The purchaser or purchasers shall not be required to see to the application of the purchase money.

Third. And upon this further trust, that the proceeds derived from such sale or sales, after paying and deducting necessary expenses attending such sale or sales shall be paid unto the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of the City of Washington, District of Columbia, and the receipt of the Treasurer of said Society shall be a sufficient discharge to said Trustees for the payment of said money. The money so paid to said society shall be applied by them in their discretion in the erection of a building as a memorial to grantor's departed husband, Robert Magaw, and to grantor Alice D.
426 Magaw, to be used either for the purposes of a church, hospital, orphanage, mission home, school, or some other missionary purpose in the discretion of said society. Said building shall be erected either in China or India and the character of said memorial, and the particular place at which it shall be located, shall be determined by the said society in its discretion. Such determination shall be conclusive and binding upon all parties.

And the said party of the first part covenants that she will warrant specially the property hereby conveyed, and that she will execute such further assurances of said land as may be requisite.

In witness whereof the said party of the first part has hereunto set her hand and seal on the day and year first hereinbefore written.

ALICE D. MAGAW. [SEAL.]

Signed, sealed and delivered in the presence of—
E. S. LA FETRA.
C. M. FORREST.

DISTRICT OF COLUMBIA, *To wit:*

I, C. M. Forrest, a notary public in and for the District of Columbia, do hereby certify that Alice D. Magaw, widow, party to a certain

Deed, bearing date on the 28th day of May A. D. 1907, and hereto annexed, personally appeared before me in said District, the said Alice D. Magaw being personally well known to me as the person who executed the said Deed, and acknowledged the same to be her act and deed.

427 Given under my hand and seal this 28th day of May A. D. 1907.

[SEAL.]

C. M. FORREST,
Notary Public, D. C.

(Endorsed:) Received for Record on the 28th day of May A. D. 1907 at 2:32 o'clock P. M.; and recorded in Liber No. 3076 at folio 215 et seq. one of the Land Records of the District of Columbia, and examined by R. N. Dutton, Deputy Recorder.

428 Transcript No. 6433.

COMPLAINANT'S EXHIBIT No. 61.

Health Department of the District of Columbia.

A Transcript from the Record of Deaths.

Certificate of Death.

No. Burial Permit 175,398. No. of Record 175,133.

District of Columbia.

Full instructions for the guidance of those using this blank, and space for remarks may be found on the other side.

1. Date of this Death, Aug. 10, 1907.
2. Full name of deceased, Alice D. Magaw.

If an unnamed infant insert full name of both parents.

3. Sex: Female.
4. Age: Years, 83. Months, 6. Days, —.
5. Color: White.
6. Conjugal conditions: Widowed.

Under sex, color, and conjugal condition, strike out the words not applicable.

Under color, the term "colored" includes all of African descent, whether of pure or mixed blood.

7. Occupation ——.
8. Birthplace of deceased ——.
9. Birthplace of Father ——.
10. Birthplace of Mother ——.

} If born in the United States, give State, Territory or District; otherwise give county.

11. Duration of residence in this District ——.
12. Place of death, La Fetra's Hotel.

13. Cause of death. Duration:
Primary—Cerebral Thrombosis. 2 mos.
Immediate—Oedema of lungs and general exhaustion.
14. If death occurred in an Institution, give:
Name of Institution ——.
Length of time Deceased was an inmate ——.
15. If Deceased did not Die at His or Her Residence, give:
Place of residence ——.

I hereby certify that I attended the deceased professionally during her last illness.

GEO. W. N. CURTIS, M. D.,
Address, 110 E. Cap. St.

To be filled out and Signed by the Undertaker:

Place of Burial, Brooklyn, N. Y. Date of Burial, ——, 1907.
Route of Transportation, Penna. R. R. Date of Removal, Aug. 11, 1907.

Signature, JOHN R. WRIGHT CO., *Undertaker*,
Address, 1337 10 St. N. W.

Remarks: ——.

429 Correct. A. C. P.

WASHINGTON, D. C., *Dec.* 26, 1907.

The foregoing is a true and correct copy of a certificate of death on file with the Health Department of the District of Columbia, and duly recorded in the records of said Department.

[SEAL.] WM. C. WOODWARD, M. D.,
Health Officer, District of Columbia.
Attest: HARRY C. McLEAN, *Chief Clerk.*

430 COMPLAINANT'S EXHIBIT NO. 62.

(Also Marked "Compl't's Ex. #2 of Oct. 9, 1908.")

JAN 17TH, 1905.

MY DEAR SON: Your letter and check received, and check deposited. It gave me much pleasure to see your handwriting on the envelope which was handed me on my way to breakfast. The day being fine, Mrs. Williams & I walked to the bank, it being my first outing in some days. About an hour ago I received a telegram from Fred saying he would arrive at 6 p. m. on Pa. Road, so I have secured a room. I am glad to learn of Teunis recovery and hope he will rapidly regain his accustomed strength, so that their visit here will be a pleasure to both. Teunis certainly had a long serious and expensive sickness. I wonder if the digging of sewers & grading of streets had something to do with the cause of typhoid cases?

I expected a letter from Mabel today as I supposed she wrote to

me on Sunday? and why does not Clara write any more to me? I want letters all the time from all of you—do write.

Yours in love,

MOTHER.

P. S.—I know my letter must be very unsatisfactorily stated because I do not see what I write and that makes a great difference, but you must make allowances. Marie called in this A. M. Addie joins me in much love to all.

MOTHER.

431 DISTRICT OF COLUMBIA,
City of Washington, ss:

I, Alice D. Magaw, of the City of Washington, District of Columbia, Do hereby Certify, That a certain indenture of Mortgage, bearing date the first day of July, one thousand nine hundred and two, made and executed by Charles E. Schiffman to Alice D. Magaw, Robert Magaw and Stephen R. Magaw, to secure the payment of the sum of Twenty three thousand, six hundred and twenty nine 24/100 ($23,629.24) dollars, and interest, and recorded in the office of the Register of the County of Kings, State of New York in Section 20 in Blocks 6,705, 6706, 6,707, 6,708, 6,715, 6,716, 6,717, in Liber 7 of Mortgages, page 423 on the eleventh day of July, in the year one thousand nine hundred and two, — o'clock in the — is paid. And I do hereby consent that the same be discharged of Record Dated the 29th day of March, 1907 Alice Magaw (L. S.) Alice D. Magaw.—In the presence of John E. Mitchell District of Columbia City of Washington SS: On the thirtieth day of March in the year one thousand nine hundred and seven before me personally came in the City and District aforesaid, Alice D. Magaw, to me known, and known to me to be the individual described in, and she executed the foregoing instrument, and acknowledged to me that she executed the same. In Witness Whereof, I have hereunto set my hand and affixed my official seal at Washington City, in the District of Columbia, this 30th day of March, 1907. John E. Mitchell a Commissioner of Deeds for the State of New York, in and for the District of Columbia. My commission expires March 14, 1908. (L. S.) State of New York Office of the Secretary

432 of State, SS: I hereby certify, that John E. Mitchell of Washington, District of Columbia, was, at the time of taking the proof and acknowledgment mentioned in his annexed certificate, a Commissioner for the State of New York, to take the proof and acknowledgment of deeds and other instruments to be used or recorded in this state and to administer oaths and affirmations, and that such Commissioner was at the time aforesaid, duly authorized to take the same, and that I have compared the signature of the said Commissioner to the certificate subjoined to the annexed instrument with the signature of such Commissioner deposited in this office, and have also compared the impression of the seal affixed to such certificate with the impression of the seal of such Commissioner, deposited in this Office and I verily believe the signature and impression of the seal to the said certificate to be genuine. Witness

my hand and the seal of the Secretary of State, at the City of Albany this second day of April, in the year one thousand nine hundred and seven. James L. Whalen Deputy. Secretary of State. (L. S.)

The land affected by this instrument lies in section 20, in Blocks 6,705 to 6,708 incl. & 6,715 to 6,717 incl. on the land map of the County of Kings.

Recorded Apr. 23, 1907.

Liber 636 Certificate to cancel mortgages page 547.

E. J. McCARTHY, *Comparer.*

433 REGISTER'S OFFICE,
County of Kings, State of New York:

I, William A. Prendergast, Register of the said County, have compared the annexed copy with an instrument Alice D. Magaw to Charles E. Schiffman recorded in this office, on the 23rd day of April A. D., 1907, at — o'clock — min. — M. in liber 636, page 547, of —— section Certificates to Cancel Mortgages 20 blocks 6705 to 6708 inclusive & 6715 to 6717 inclusive and certify the same to be a correct transcript therefrom, and of the whole of said instrument.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, this 23rd day of March 1909.

WM. A. PRENDERGAST, *Register.*

E. J. McCARTHY,
By WALDO R. BLACKWELL,
Ass't Deputy Register. 24.

Alice D. Magaw. Recorded in Liber 636, Certificates to cancel. Mortgages page 547 to Greater New York Development Company. Satisfaction of Mortgage. Dated March 29, 1907. The land
434 affected by the within instrument lies in Section 20 in Block 6705 to 6708 incl. & 6715 to 6717 incl. on the Land Map of the County of Kings. R. & R. Wood, Harmon & Co., 261 B'way, N. Y. C. E. J. McCarthy, Comparer.

Memorandum.

For Complainant's Exhibit No. 63 see stipulation at page 471 of this record. (This Exhibit is "Compl't's Ex. #3 of Oct. 9, 1908.")

435 *Deposition of Van Brunt Magaw.*

Filed Mar. 11, 1909.

In the Supreme Court of the District of Columbia.

No. 27393. In Equity.

ROBERT MAGAW
vs.
AMELIA E. HUNTLEY et al.

Commission to Take Depositions.

The President of the United States to Robert H. Ewell, Esq., New York City, Greeting:

Know you, That in confidence of your prudence and fidelity, you have been appointed and by these presents you are invested with power and authority to examine Van Brunt Magaw as witness for the defendants in the above-entitled cause upon the interrogatories annexed to this commission; wherefore, you are hereby commanded, at a certain day and place, or certain days and places, to be appointed by you, to cause said witness to come before you and then and there examine him on oath or affirmation, upon the said interrogatories and reduce his testimony into writing to be signed by said witness; and having so done, annex the same to this commission, closed up under your seal, and make return thereof into said Court with all convenient speed.

Witness The Honorable Harry M. Clabaugh, Chief Justice of said Court, the 17th day of February A. D. 1909.

J. R. YOUNG, *Clerk,*
By F. E. CUNNINGHAM,
Assistant Clerk.

436 In the Supreme Court of the District of Columbia.

No. 27393. In Equity.

ROBERT MAGAW
vs.
AMELIA E. HUNTLEY et al.

At the execution of the foregoing commission issued out of the Supreme Court of the District of Columbia, and to me directed, empowering me to examine witnesses in the above-entitled cause, I Robert H. Ewell, the commissioner in the said commission named, first duly took the following oath before George F. Harrison, Notary Public:

"I shall according to the best of my skill and knowledge, truly, faithfully, and without partiality to any or either of the parties, take

whether or not the signature thereto is yours? If yea, the examiner will file the same as a part of your deposition.

Fifth. If your answer to the last interrogatory be yea, state for what this check was given, and all circumstances connected therewith, fully. File all letters written by you, your agent or attorney, to your mother, relating to this check, or the business with which it had to do, and all letters sent to you by her, or by any one else acting for her, relating thereto. If you say you have no such letters, state fully what has become of them, and where they now are.

Sixth. State who wrote the memorandum "Account of Rob. and Steve Magaw," on the back of said check, and why said memorandum was endorsed thereon.

Seventh. If in answer to the fifth interrogatory, you say
441 that the proceeds of the check represented your mother's dower interest in the proceeds of a certain mortgage, given in payment of part of the purchase money of certain real estate belonging to your father, state when the mortgage was given, where recorded, and all the details connected with said transaction.

Eighth. Please state when the property was sold, for what the mortgage was given, the names of the grantor and grantee, and where the same is recorded?

Ninth. State whether or not you or your attorneys or agents, sent to your mother a deed of release, or other paper writing for her to sign and execute before some person having power to take acknowledgments of deeds in the District of Columbia, at or about the time you sent said check to her? If yea, state where the paper now is, and please produce the same to the examiner, that he may make a copy thereof, as part of your deposition. If you state it is not in your possession, state where it is; whether it was recorded, and where?

Tenth. State whether or not your mother had, at the time of her death, an account with the American Security and Trust Company of this City? If yea, whether you obtained a settlement of said account, and the return to you, of the checks given by her during her lifetime. If yea, produce any of said checks relating to any business transactions occurring subsequent to August 1905; and especially one for the sum of $1500, given by her in the month of June,

1907. State whether the signature thereto is her signature,
442 and file the same as part of your deposition. If you state that the check is not in your possession, state where it is.

Eleventh. State whether or not you had any other business transactions with your mother, from August 1905, until her death, than that relating to the sending of your said check for $1200? If yea, what? State in detail the nature of the transactions, and to what the same related.

Twelfth. If you have in your possession, any letter or letters relating to any business transactions between yourself and your mother, or between anybody else and your mother, written by her, or on her behalf, or by yourself or other persons, please produce them all and file them as part of your deposition.

Thirteenth. Did or did not your mother, in December 1906, or thereabouts, have any business transaction with the complainant.

If yea, state what it was fully; whether it related to the sale of real property or personal property, or what was it- character and nature; and whether the business was done by complainant personally, or through his attorney; if the latter, state the name of such attorney or agent.

Fourteenth. Do you know personally, or from conversations had with complainant, or other persons, whether or not he has had any business dealings with your mother, subsequent to August 1905? If yea, state what they were; who was his agent or attorney in such transactions, and all you know about the same.

443 Fifteenth. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

B. F. LEIGHTON,
Solicitor for Defendants Huntley,
Tilton, Fague, and La Fetra.

In the Supreme Court of the District of Columbia.

In Equity. No. 27393.

ROBERT MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY et al., Defendants.

STATE OF NEW YORK,
County of New York, ss:

VAN BRUNT MAGAW, having been by me sworn to testify the truth, the whole truth, and nothing but the truth, concerning the cause for which this deposition is taken, deposed and stated as follows:

To the first interrogatory he answered and said:

I am and I have already testified.

444 To the second interrogatory he answered and said:

No, I am not the executor of my mother's will and may never be. I am at present the collector on appointment of the Court.

To the third interrogatory he answered and said:

Soon after the death of my mother, Miss Fague and Mrs. La Fetra delivered to me some papers which they informed me belonged to my mother. I never saw my mother's desk, or any of her furniture, after her death, all of which had been removed from her room before I had an opportunity to take charge of her effects. Whether all the papers and effects were delivered to me I do not know, but I will produce any letters, books and papers that may be under my control. From August 1905, until her death I received no letters of any kind signed by herself, and there are no letters written

to my mother by my agent or attorney on my behalf that I know of.

To the fourth interrogatory he answered and said:

The signature of the $1,200 check shown me is my signature. (This check is dated May 23, 1907, not May 27, 1907 as stated in interrogatory.)

To the fifth interrogatory he answered and said:

The $1200. check represented what I thought was my mother's share of a fund of $7,800. then in my possession. I do not know of my own knowledge how the fund arose, nor just what my mother's interest in it was. It was placed in my hands by my nephew, Robert Magaw, because, as he informed me, my mother was en-
445 titled to the interest on it during her lifetime, and on her death the principal was to be equally divided between my nephews, Robert and Steven Magaw, or their heirs or assigns. In April, 1907, Robert Magaw insisted on having the fund divided and I therefore divided the money as requested by Robert and his brother Steven Magaw, and retained $1,200. to cover my mother's interest in the fund. The defendant Miss Hettie Fague wrote me a letter about it and I replied. Both letters are herewith filed. (Witness produces two letters, one without date, addressed to Mr. A. D. Magaw, signed by Hettie H. Fague, and marked "Written for Mrs. A. D. Magaw"; the other letter is dated May 13, 1907, addressed to "Dear Mother," and signed V. B. Magaw. I acted for the protection of my mother's interest in the fund, upon my own risk and responsibility, and without any instructions from her except the letter of Hettie H. Fague herewith filed which I considered no instruction at all. My mother was plainly incompetent to manage her affairs and had no conception of the transaction, and someone had to act for her, and as there was no one else in Brooklyn to do it, I assumed the responsibility and divided the money, as I have stated. I did not write any other letter relating to this check, as far as I can find or remember, nor did my attorney or agents on my behalf write any such letters.

To the sixth interrogatory he answered and said:

The memorandum "Account of Rob. and Steve. Magaw" on the $1,200. check was written by myself before the check was
446 sent to my mother, and was intended to indicate that the check related to the $7,800 in which Robert and Steven Magaw were interested.

To the seventh interrogatory he answered and said:

I do not know how the $7,800. fund arose. Robert Magaw may have told me that it came from a mortgage. I never had any knowledge or information as to its details, or how it came to be made, nor where it was recorded. My connection with the matter came about only because the complainant, Robert Magaw, could not do any business with my mother because of her mental condition, and I was called upon to hold the fund for mother's protection until some other disposition of it could be made.

To the eighth interrogatory he answered and said:

I am absolutely unable to give any of the facts called for by this

question. You are asking for something that never was any of my business, and about which I know nothing.

To the ninth interrogatory he answered and said:

I did not send my mother a deed of release, or any other paper, for her to sign or execute in Washington. If she signed such a paper, I never saw it, and it was not done at my request, and I know very little, if anything about it. I do not know where it is now.

To the tenth interrogatory he answered and said:

My mother at the time of her death had an account with the American Security & Trust Co. After her death I had her
447 account balanced, and certain checks given by her were returned to me. Some of these checks are already in evidence as part of the complainant's case, but the others so far as they relate to business transactions subsequent to August, 1905, I herewith file. (Witness produces seven checks each drawn on the American Security & Trust Company, and signed A. D. Magaw, as follows: One dated Washington, D. C., Jan. 15, 1907 to the order of E. S. La Fetra, for $64.79; one dated Washington, D. C. June 7th, 1907, No. 178, to the order of Martha A. Bremerman, for $1,500.; one dated Washington, D. C. July 30th, 1907, to the order of Miss Hettie Fague for $41.10; one dated Washington, D. C., Sept. 11th, 1905, No. 120, to the order of Sarah D. La Fetra, for $100.; one dated Washington, D. C., Oct. 18th, 1905, No. 121, to the order of Geo. W. N. Custis, M. D., for $76.; one dated Washington, D. C., Oct. 18th, 1905, No. 121, to the order of E. S. La Fetra, for $68.03; and one dated Washington, D. C.; Nov. 6, 1905, No. 122, to the order of E. S. La Fetra, for $88.30.) The $1,500. check, dated June 7th, 1907, seems to bear mother's signature.

To the eleventh interrogatory he answered and said:

I had no business transactions with mother, between August, 1905, and the time of her death in August, 1907. I sent her a check from time to time. My reason for so doing was the fact that mother was very old and critically ill and expected to die at any time. She was surrounded by the defendants Sarah D. La Fetra and Hettie Fague, and their friends and employees. She was wholly under their in-
fluence. She depended on them for her very existence. I
448 did my best to have a Guardian appointed for her, but Dr. Custis would not help me. He said he could bring mother out all right. I tried to bring my mother home, but I was opposed by Mrs. La Fetra and Miss Fague. I had no right to remove her by force; and I could not get her away from Mrs. La Fetra in any other way. The only thing I could do was to send her money from time to time by check, and this I did.

To the twelfth interrogatory he answered and said:

I have no letters in my possession relating to any business transactions between myself and my mother.

To the thirteenth interrogatory he answered and said:

I do not know and have no information as to whether mother had any business transaction with the complainant, on or about December, 1906. The complainant and I are not connected in business in any way, and he does not know about my affairs, nor do

I know about his, except that I have been consulted by him sometimes.

To the fourteenth interrogatory he answered and said:

As far as I know or have any information, the only transaction that complainant had subsequent to August, 1905, relating to my mother's affairs was the one in connection with the $7,800. fund, and above referred to. In that matter his attorney was Mr. F. S. McDivitt.

To the fifteenth interrogatory he answered and said:

I was satisfied I had exhausted every reasonable means to care for my mother. Immediately after her unfortunate, dreadful affliction in August, 1905, and within a month after she left her
449 home at our house in Brooklyn I consulted Mr. J. B. Larner, a very able lawyer and estimable gentleman of Washington, where my mother was then stopping. He advised myself and the complainant in this case, Robert Magaw, against all unpleasantness of a proceeding for a Guardian, which would be opposed by her physician, Dr. Custis, as in that case a commission in lunacy appointed by the Court would be the only resort, which I also disliked. Besides, Dr. Custis, Jr. a son of her regular physician in attendance, who came to see my mother professionally while I was there, told me she would never get any better and could not possibly last long. I received the $7,800. in question, $1,200. of which was paid over to her. It did not belong to me, and I could have been prosecuted for keeping it, and as there had been no guardian appointed, I do not see how I could have acted otherwise.

VAN BRUNT MAGAW.

450 Mr. A. D. Magaw:

I enclose Mr. McDivitt's letter to you. Please write at once, and advise your mother what to do, she does not know. What right have Robinson Bros. to say how your Mother's share should be invested? Do you think $1200 a fair price to pay her? Please advise her at once, so she can answer McDivitt. Please return this letter and the one I mailed you the other day.

Very respectfully, HETTIE H. FAGUE.

Written for Mrs. A. D. Magaw.

451 1486 Ocean Ave.

MAY 13, '07.

DEAR MOTHER: I rec'd Miss Fague's letter "undated" Sunday by special mail. Replying I would say this Matter has given me considerable anxiety. Mr. McDivitt's letter seems to be very plain, and I think perhaps you had better take his advice the amount $1200.00 is based on the usual way of calculation by the Northampton tables. I suppose. You ask what right has Mr. Robinson to say how it shall be invested. Why the principal belongs to them and Robt. Magaw'- Mother has the interest only during her lifetime, and afterward it goes to them, so you see they want it not only invested safely but so it can be converted into cash promptly, which could not be always done with a Mortgage. *I suppose Mother would be*

better to get the interest regularly, but if she will invest the $1200.00 in a small Mortgage down there in Washington she will probably get 5½ or 6 per cent then she will come out all right. I will send by this mail the other letter you sent me. I have to keep in with a sick headache today the others are enjoying their usual degree of health.

Hoping Mother will make a satisfactory decision in this matter I will close and Mail this immediately.

Your Affectionate Son,

V. B. MAGAW.

452 WASHINGTON, D. C., *Sept.* 11*th*, 1905. No. 120.

American Security and Trust Co.

Pay to Sarah D. La Fetra or order $100.00/100 One Hundred Dollars.

her
A. D. x MAGAW.
mark.
J. B. GREGG CUSTIS.

Witness:
V. B. MAGAW.

(Endorsement on face of check.)

Paid Sep. 14 1905.

(Other part of endorsement illegible.)

(Endorsements on back of check.)

Sarah D. La Fetra; E. S. La Fetra.

WASHINGTON, D. C., *Oct.* 18*th*, 1905. No. 121.

American Security and Trust Co.

Pay to Geo. W. N. Custis M. D. or order $76.00/100 Seventy-six Dollars.

her
ALICE D. x MAGAW.
mark.

Witness-:
V. B. MAGAW.
GEO. W. N. CUSTIS, M. D.

(Endorsement on face of check.)

American Security and
Trust Company. Paid
Oct. 20 1905.

(Endorsement on back of check.)

The National Capital Bank
of Washington. Washington
D. C. Oct. 20 1905.
All prior endorsements
guaranteed.

Geo. W. N. Custis.

453 WASHINGTON, D. C., *Oct.* 18, 1905. No. 121.

American Security and Trust Co.

Pay to E. S. La Fetra or order $68.03/100 Sixty-eight 03/100 Dollars.

her
A. D. x MAGAW.
mark.

Witness-:
V. B. MAGAW.
GEO. W. N. CUSTIS, M. D.

(Endorsement on face of check.)

American Security & Trust Company.
Paid Oct. 19 1905.

(Endorsement on back of check.)

E. S. La Fetra.

WASHINGTON, D. C., *Nov.* 6, 1905. No. 122.

American Security and Trust Co.

Pay to E. S. La Fetra or order $88.30 Eighty-eight and 30/100 Dollars.

A. D. MAGAW.

(Endorsement on face of check.)

American Security & Trust Company.
Paid Nov. 6 1905.

(Endorsement on back of check.)

E. S. La Fetra.

454 WASHINGTON, D. C., *Jan.* 15, 1907.

American Security & Trust Company

Pay to the order of E. S. La Fetra Sixty-four and 79/100 Dollars.
$64.79. A. D. MAGAW.
Night.

(Endorsement on face of check.)

American Security and
Trust Company. Paid
Jan. 16 1907.

(Endorsements on back of check.)

The Commercial National Bank
Prior Endorsements
Jan. 16 1907
Guaranteed.

Washington, D. C.
E. S. La Fetra.

Pay to the
Commercial National Bank
Washington, D. C. or order.
All previous endorsements guaranteed
Washington Exchange Bank
Washington, D. C.
Geo. O. Wilson, Cashier.

455 No. 495. BROOKLYN, N. Y., *May* 23, 1907.

Mechanics' Bank

Pay to the order of Alice D. Magaw Twelve hundred Dollars.
$1200.00/100. VAN BRUNT MAGAW.

(Endorsements on back of check.)

Account of Rob. and Steve Magaw.
Deposit to the credit of
Alice D. Magaw.

Pay Riggs National Bank,
Washington, D. C., or
order, All prior endorse-
ments guaranteed
May 27 1907

American Security & Trust Co.
J. E. Howe, Treas.
Received Payment
Through New York Clearing House,
May 28 1907
The Bank of America.

Pay Bank of America, N. Y.
Or Order
Prior Endorsements Guaranteed
The Riggs National Bank,
of Washington, D. C.
Henry H. Flather, Chas-ier.

456 No. 178. WASHINGTON, D. C., *June 7th,* 1907.

$1500.

American Security & Trust Company

Pay to the order of Martha A. Bremerman Fifteen Hundred Dollars.
$1500.00.

A. D. MAGAW.

(Endorsements on face of check.)

Good
When Properly Indorsed
$1500#
Chas. E. Howe Treas.
Don't Destroy
American Security & Trust Co.

American Security
Paid

(Endorsements on back of check.)

Martha A. Brennerman
Philip A. Christman

Traders National Bank
Washington, D. C.
May 12 1907
All Previous
Endorsements Guaranteed.

457 No. —. WASHINGTON, D. C., *July 30th,* 1907.

American Security & Trust Company

Pay to the order of Miss Hettie Fague Forty-One & 10/100 Dollars.
$41.10.

A. D. MAGAW.

(Endorsement on face of check.)

American Security and
Trust Company. Paid
Aug. 14, 1907.

(Endorsements on back of check.)

Hettie Fague

Pay Commercial National Bank,
Washington, D. C.
Or order,
Citizens Savings Bank,

The Commercial National Bank,
Prior Endorsements
Aug. 14 1907
Guaranteed
Washington, D. C.

458 *Defendants' Exceptions.*

Filed Mar. 29, 1909.

In the Supreme Court of the District of Columbia.

In Equity. No. 27393.

ROBERT MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY et al., Defendants.

Come now the defendants by B. F. Leighton, Esq., their solicitor, and except to certain answers of Van Brunt Magaw, made to the interrogatories propounded to him, in his deposition filed in this case, as follows, to-wit:

First. To that part of his answer to the fifth interrogatory, commencing with "I acted for the protection" and ending with "I assumed the responsibility and divided the money as I have stated."

Second. To that part of his answer to the seventh interrogatory, commencing with "My connection with," and ending with the sentence.

Third. To so much of his answer to the eleventh interrogatory as commences with "My reason for so doing," and ending with the close of said answer.

Because said parts of said answers are self-serving, voluntary statements of a hostile witness, and not responsive to the interrogatories propounded to the witness. And defendants will move, at the hearing of this cause, to strike the same out.

B. F. LEIGHTON,
Sol. for Defendants.

459 *Motion for Leave to Amend.*

Filed May 26, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27393.

ROBERT D. MAGAW, Complainant,
vs.
HUNTLEY et al., Defendants.

B. F. Leighton, Esq., of Counsel for the Defendants.

Please take notice that the motion for the allowance of an amendment to the original bill filed herein, will be presented to his Honor, Mr. Justice Barnard, in Equity Court No. 1, on Wednesday, May 26, 1909, at ten o'clock A. M., or as soon thereafter as counsel may be conveniently heard.

FRANCIS STOCKTON McDIVITT,
E. HILTON JACKSON,
Solicitors for Complainants.

460 *Amendment.*

Filed May 26, 1909.

In the Supreme Court of the District of Columbia, Holding Equity Court.

Equity. No. 27393.

ROBERT D. MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY, LYDIA H. TILTON, HETTIE H. FAGUE, Individually and as Trustee of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church, of Washington; Sarah D. La Fetra, Individually and as President of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church; Van Brunt Magaw, Frederick L. Magaw, Stephen Magaw.

Now comes the complainant through his attorneys, Francis S. McDivitt and E. Hilton Jackson and moves the Court to allow the following amendment of and to the original bill filed herein:

1. To amend paragraph 2 of said bill by adding the defendant, Charles M. Forrest, who is of lawful age and is sued in his own right as one of the participants in the fraud and undue influence exercised over and upon the decedent, Alice D. Magaw, in connection with the procurement of the execution of the deed of May 28, 1907, filed as a part of said original bill and marked "Exhibit A."

2. To amend paragraph 5 of said original bill by adding
461 the following:

The complainant further avers and charges that Alice D. Magaw, the decedent herein, at the time of the execution of the deed of May 28, 1907, sought to be cancelled and set aside by these proceedings, had been stricken with two distinct and independent strokes of paralysis, was suffering with partial blindness by reason of cataract and because of her advanced years, physical and mental weakness, was wholly dependent upon the defendants, Hettie H. Fague and Sarah D. Le Fetra for care, nursing and attention; that she was also dependent upon the said Hettie H. Fague and Sarah D. La Fetra for aid in, and attention to her business affairs, both for a long time prior and subsequent to the execution of the deed aforesaid, and complainant further avers that the said Sarah D. La Fetra was her confidential adviser in relation to her business affairs; the said decedent was also dependent upon the defendant, Charles M. Forrest, for aid in and attention to her business affairs, and complainant further avers that said Forrest from sometime in December, 1906, up to the death of the decedent Alice D. Magaw, was her real estate agent and the manager of her property, and along with the aforesaid Sarah D. La Fetra, was her confidential adviser in relation to her property and business affairs.

3. By adding the following to paragraph 7 of the bill of complaint herein:

Complainant further avers and charges that because of the relations of confidence heretofore set forth as subsisting between the decedent, Alice D. Magaw, and the defendants herein, but
462 more particularly between the decedent and the defendants Hettie H. Fague, Sarah D. La Fetra and Charles M. Forrest and, with the intention of cheating and defrauding the heirs at law of said decedent out of their share of the aforesaid property and taking advantage of the close and confidential relations hereinbefore referred to, procured her to execute and deliver said deed without the knowledge of said heirs at law, and thereafter the defendant, Charles M. Forrest, either placed or caused to be placed on record the deed as aforesaid, since which time all the defendants herein have refused to permit any of the heirs at law of the said decedent to have the rents and profits of said property.

4. To amend paragraph 10 in said original bill by adding the following:

(*d*) That a writ of subpœna may be issued from this Honorable Court directed to the defendant, Charles M. Forrest, commanding him to appear and answer the exigencies of this complaint.

(*e*) That costs may be decreed against the defendant Charles M. Forrest, and such other relief as to the Court may seem right and proper.

FRANCIS STOCKTON McDIVITT,
E. HILTON JACKSON,
Solicitors for Complainant

463 In the Supreme Court of the District of Columbia, Holding Equity Court.

Equity No. 27393.

ROBERT D. MAGAW, Complainant,
vs.
HUNTLEY et al., Defendants.

I, Francis S. McDivitt, being first duly sworn depose and say that the proposed amendment to the original bill of complaint herein is not offered for the purpose of vexation or delay and that the matter of said amendment is material and could not with reasonable diligence have been sooner brought to the attention of the Court.

FRANCIS STOCKTON McDIVITT,
Of Counsel for Complainant.

Subscribed and sworn to before me this 26th day of May, 1909.

[SEAL.] C. CLINTON JAMES,
Notary Public.

464 *Decree Dismissing Bill with Costs.*

Filed June 7, 1909.

In the Supreme Court of the District of Columbia.

In Equity. No. 27393.

ROBERT MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY et al., Defendants.

This cause came on to be heard at this term of Court, on bill, answers, and testimony on file therein, and the motion of complainant to amend his said bill; and was argued by counsel whereupon, on consideration thereof, it is this 7th day of June, 1909, adjudged, ordered and decreed, that the application of complainant for leave to amend his said bill, be, and the same hereby is denied; and that said cause be, and the same hereby is dismissed, with costs, to be taxed by the Clerk; and that defendants have execution therefor, as at law.

By the Court.

JOB BARNARD, *Justice.*

465 *Decree Allowing an Appeal.*

Filed June 9, 1909.

In the Supreme Court of the District of Columbia.

No. 27393. Equity.

ROBERT MAGAW
vs.
AMELIA HUNTLEY et al.

The complainant having prayed an appeal in open Court from the decree passed herein June 7, 1909, the same is allowed, and the bond therefor for costs, is hereby fixed at $100 this 9th day of June 1909, now for then.

JOB BARNARD, *Justice.*

466 *Bond for Appeal to Court of Appeals.*

Filed Jun- 23, 1909.

In the Supreme Court of the District of Columbia.

No. 27393. In Equity.

ROBERT MAGAW
vs.
AMELIA E. HUNTLEY et al.

Know all men by these presents, that we, Robert Magaw as principal, and Illinois Surety Company as surety, are held and firmly bound unto the above named Amelia E. Huntley et al., in the full sum of One Hundred dollars to be paid to the said Amelia E. Huntley et al., their executors, administrators successors, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents. Sealed with our seals, and dated this — day of June, in the year of our Lord one thousand nine hundred and nine.

Whereas the above-named Robert Magaw has prosecuted an *an* appeal to the Court of Appeals of the District of Columbia, to reverse the Decree rendered in the above suit by the said Supreme Court of the District of Columbia:

Now, therefore, the condition of this obligation is such, that if the above-named Robert Magaw shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then

this obligation shall be void; otherwise, the same shall be
467 and remain in full force and virtue.

ROBERT MAGAW, [SEAL.]
ILLINOIS SURETY COMPANY, [SEAL.]
By LOUIS L. PERKINS, [SEAL.]
Attorney in Fact.

Sealed and delivered in presence of—
SUSAN B. MAGAW.

O. K.

——— ———,
Counsel for Defendants.

Approved the — day of ———, 1—.

WRIGHT,
Justice S. C. D. C.

Memorandum.

1909, July 9.—Time in which to file transcript of record in Court of Appeals of the District of Columbia, extended from time to time to January 20th, 1910, inclusive.

468 *Directions to Clerk for Preparation of Transcript of Record.*

Nov. 16, 1909.

In the Supreme Court of the District of Columbia.

In Equity. No. 27393.

ROBERT MAGAW, Complainant,
vs.
AMELIA E. HUNTLEY et al., Defendants.

It is hereby mutually stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that the following shall constitute the record on appeal from the decree of Justice Job Barnard to the Court of Appeals of the District of Columbia, to-wit:

First. Copy of complainant's bill, and of the exhibits filed therewith, October 5, 1907.

Second. Copies of the answers of defendants to said bill, namely, answers of Hettie H. Fague, Amelia Huntley, Lydia H. Tilton and Sarah D. La Fetra, all filed November 21, 1907.

Third. Copy of general replication.

Fourth. Transcript of the evidence, prepared by complainant's Attorneys, filed with and made part of this stipulation.

Fifth. The deposition of Van Brunt Magaw, together with the exhibits filed with said deposition.

469 Sixth. The following exhibits offered in evidence by complainant, to-wit: Last will, testament and codicil of Alice D.

Magaw, No. 59; Deed in Trust, No. 60; certificate of death, No. 61; Letters written by Alice D. Magaw, Nos. 62 and 63, filed April 26, 1909.

Seventh. Copy of the satisfaction of mortgage offered in evidence by defendants, dated March 29, 1907, and found on page 383 of defendant's Testimony, together with the endorsements on the back of said paper.

Eighth. Judgment pro confesso against defendants, Van Brunt Magaw, Frederick Magaw, and Stephen Magaw, filed December 10, 1907.

Ninth. Motion for leave to amend bill of complaint filed May 26, 1909.

Tenth. Decree dismissing Bill of Complaint with costs, filed June 7, 1909.

Eleventh. Allowance of appeal by complainant filed June 9, 1909.

Twelfth. A list of all the checks offered of Alice D. Magaw in evidence as follows:

Date. Amount. Payee. Endorsement on face of Checks.

Appeal bond filed June 23, 1909.

Order extending time Nov. 12.

ROBERT MAGAW,
By E. HILTON JACKSON,
F. S. McDIVITT,
His Attorneys.

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AMELIA E. HUNTLEY,
LYDIA H. TILTON,
HETTIE H. FAGUE,
SARAH D. LA FETRA,
By B. F. LEIGHTON,
Their Attorney.

471 *Stipulation for Court of Appeals Record.*

Filed Jan. 14, 1910.

In the Supreme Court of the District of Columbia.

In Equity. No. 27393.

ROBERT MAGAW
vs.
AMELIA E. HUNTLEY et al.

It is hereby stipulated by counsel for the respective parties hereto that the original exhibit marked "Complainant's Exhibit No. 63" shall go to the Court of Appeals as a part of the transcript of record herein.

E. HILTON JACKSON,
Attorney for Complainant.
B. F. LEIGHTON,
Attorney for Defendants.

472 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 471, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 27293 in Equity, wherein Robert Magaw is Complainant and Amelia E. Huntley, et als. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of January, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2109. Robert Magaw, appellant, vs. Amelia E. Huntley et al. Court of Appeals, District of Columbia. Filed Jan. 19, 1910. Henry W. Hodges, Clerk.

Court of Appeals, District of Columbi

APRIL TERM, 1910.

No. 2109.

ROBERT MAGAW, APPELLANT,

against

AMELIA E. HUNTLEY ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT COLUMBIA.

BRIEF FOR APPELLANT.

E. HILTON JACKSON,
Solicitor for Complainant.

FRANCIS STOCKTON MCDIVITT,
Of Counsel.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2109.

ROBERT MAGAW, APPELLANT,

against

AMELIA E. HUNTLEY ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

This is an appeal from a decree of the Supreme Court filed June 7, 1909, dismissing the bill of complaint with costs.

The suit was brought in equity for the annulment of a deed (made without consideration) on the ground that it was wrongfully procured from the grantor by her confidential agents while she was incompetent to manage her affairs.

The grantor, in August, 1905, was stricken with paralysis,

after which she never wrote or talked intelligently. On February 21, 1907, she is alleged to have made a codicil to her will to more effectually effectuate the purposes of which she made the deed of May 28, 1907, which is the subject of the present controversy. She died August 10, 1907, and these proceedings were instituted on October 8, 1907.

The grantor was a lady 83 years of age (R., p. 18), living apart from her family (R., p. 18), so blind she could not read (R., p. 156), and so afflicted by disease of the brain (R., p 176) that she could not talk (R., p. 41) or write sensibly (complainant's original Exhibit No. 63, R., p. 237); was feeble in mind and body (R., pp. 78 and 189), wholly unable to take care of herself, and was in charge of a nurse night and day (R., p. 110); in fact, the grantor was not only under the influence of those around her; she was under their absolute control; her money affairs were in the hands of Mr. Forrest (R., p. 140), who drew the deed (R., p. 130); she depended upon the defendants, Mrs. La Fetra (with whom she boarded) and Miss Fague (nurse), for the necessities and comforts of life (R., p. 113), and upon her physian, Dr. Custis (who is 80 years of age himself), for recovery of her health.

All these people were interested in raising money for the cause of foreign missions, and Mrs. La Fetra's hotel was a general meeting place for the ladies of the missionary societies (R., p. 123); Mrs. La Fetra herself was president of the foreign missionary society (R., p. 10), Miss Fague was a member (R., p. 7), and Mr. Forrest was an honorary member of one society (R., p. 135) and was a steward and the treasurer of the church with which the missionary societies were connected (R., p. 135). Mr. Forrest had been a friend of Mrs. La Fetra's for many years, and she called him "Charlie" (R., p. 135).

But while the grantor, Mrs. Magaw, had lived in Washington many years and had made contributions to these missionary societies, she still retained her membership in

the Dutch Reformed Church at Brooklyn (R., pp. 58 and 106), and prior to her stroke of paralysis took a lively interest in her sons and grandchildren, and spent several months every year with them in Brooklyn (R., p. 61). These relatives also visited the grantor in Washington many times (R., p. 61), and she corresponded with them by letter (R., p. 61). She had previously made a will in favor of her relatives (R., p. 210), and this will she carefully kept for twelve years, and no change was made until those around her thought she was likely to die (R., p. 176), and then Mr. Forrest prepared the codicil (R., p. 131), which was soon followed by the deed at the suggestion of Mrs. La Fetra (R., p. 130).

Under these circumstances the appellant respectfully submits that "when the facts disclosed create a strong doubt of the integrity of the transaction between the vendor and the vendee, they throw on the vendee the duty of making a full explanation and the burden of proof to sustain it."

Clements *vs.* Nicholson, 6 Wall., 299, cited in Baker *vs.* Humphrey, 101 U. S., 499.

The appellant also respectfully submits that the defendants have fallen under the weight of this burden, as appears by the testimony of Mr. Forrest, one of defendants' witnesses. Mr. Forrest testifies positively that the grantor, at the time of signing, *understood the deed to be something very different from what it is.*

It is very clear, therefore, that the deed was not *the act of the grantor,* and it matters not at all (1) whether the deed was voluntary, but signed under a misapprehension of its contents and effect, or (2) whether it was involuntary and wrongfully procured at a time when the grantor was incompetent.

In either case it cannot stand in equity.

ASSIGNMENT OF ERROR.

I. The court erred in holding that the deed of May 28, 1907, was the act and deed of Alice D. Magaw.

II. The court erred in denying the application of the complainant for leave to amend (R., pp. 232, 233).

III. The court erred in dismissing the complainant's bill.

BRIEF AND AUTHORITIES.

I.

First Assignment of Error.

The court erred in holding that the deed of May 28, 1907, *was the act and deed of Alice D. Magaw.*

The complainant is the grandson of the grantor, Alice D. Magaw, and as the son of his deceased father, John D. Magaw, the complainant is entitled to one-half of the share of the estate which said John D. Magaw would have taken if living. The complainant's interest in the property in question is, therefore, an undivided one-sixth part (see will, R., p. 210).

That the complainant may maintain this action see:

Harding *vs.* Handy, 11 Wh., 103.
Shakespeare *vs.* Markham, 72 N. Y., 400.

The deed was either:

I. A voluntary conveyance (as claimed by the defendants), and subject to the rules applicable to voluntary conveyances, or,

II. An involuntary conveyance wrongfully procured when the grantor was incompetent.

Considered as a voluntary conveyance, it cannot stand in equity, for the reason that it was obtained by those standing in a confidential relation to the grantor, without independent advice, and does not conform in a material respect to the alleged purpose of the grantor. Such a deed must be *set aside* as not being the act of the grantor, for equity will not *reform* a voluntary conveyance.

It will be recalled that this is an action to *rescind* and not to ~~cancel~~ reform, and it is fundamental that a mistake of fact to justify a reformation must be mutual.

Walden *vs.* Skinner, 101 U. S., 577.
Eaton Eq., p. 277.
Story Eq. Jur., vol. 7, sec. 155.

"A mistake on one side may be ground for *rescinding* but not for *reforming* a written agreement."

Dulany *vs.* Rogers, 50 Md., 533.
Mulock *vs.* Mulock, 31 N. J. Equity, 594, 602.
Coutts *vs.* Acworth, Law Rep., 8 Equity Cas., 558.
Huguenin *vs.* Basely, 14 Vesey, 273.
White *vs.* White, 60 N. J. Equity, 104, 115.
Grant *vs.* Baird, 61 N. J. Equity, 389.
Gee *vs.* Spencer, Vernon's Ch. R., 32.
13 Cyc., 577.

This court in O'Connell *vs.* Koob, 16 App. D. C., 169, laid down the following doctrine, which has peculiar application to the case at bar:

> "It may, however, be laid down as the settled doctrine that, even in the absence of any special relation between the parties, where a person gains a great and manifest advantage over another by a voluntary instrument, the burden of proof is undoubtedly thrown upon the person receiving the benefit, and he is under the necessity of showing that the trans-

> action is fair and honest; for although the court never prevents any one from being the voluntary object of the bounty of another, yet it must be shown that the bounty was purely voluntary, and not produced by any undue influences or misrepresentations, which the court views in all cases with the utmost abhorrence."

In White *vs.* White (60 N. J. Eq., 104, 115, *supra*) the court say:

> "It is not enough that it was read to him, and that he was told generally that it conveyed the property to John, and that he so understood it. Such an 'understanding' is not sufficient in the case of an illiterate man unaccustomed to business transactions. The word 'understand' so much used by lawyers and jurists in connection with the execution of deeds, wills and such instruments, includes the realization of the practical effects and consequences *in every direction* of the proposed act, be it deed or will."

In Gee *vs.* Spencer (Vernon's Ch. R., 32) the court says: "A misapprehension in a party shall avoid his release," and in Huguenin *vs.* Baseley (14 Vesey, 273) Lord Eldon says: "The person ought not to be permitted to execute such a deed."

In Cramsey *vs.* Sterling (111 App. Div., 568, 576 and 577) the New York Supreme Court says:

> "The remaining question, which, as already intimated, it would seem should be the only question, is whether there has been sufficient proof of fraud or mistake to warrant the *rescission* of the deed and assignment. It has been seen that the consideration was utterly inadequate, so much so as to give rise to a suspicion, at least, that the contracts are oppressive. It clearly appears that this uneducated young man, who was without business experience, relied entirely on the representations of his real estate agent, Dean, whom Brown, representing the defendant, set in motion. These representations were made to Dean by Brown, and although the defendant may not have

authorized them all, yet for the purposes of this action to rescind, he is chargeable therewith and cannot retain the property, the transfer of which was induced by either false or fraudulent representations. (Bedell *vs.* Bedell, 37 Hun, 419; Page *vs.* Krekey, 137 N. Y., 312; Green *vs.* Roworth, 113 *id.*, 462; Kountze *vs.* Kennedy, 147 *id.* 124.)" * * *

"Moreover, it is to be remembered that this is an action to *rescind,* not to *reform* a contract, where proof of fraud or mutual mistake is essential. It does not matter whether the information upon which the plaintiff acted was fraudulent or not, it is sufficient that, without negligence on his part, he was led to believe and did believe *that material facts were different,* and that there is no element of estoppel in favor of the defendant to lead the court to refrain from granting a rescission."

And in Nat. Prov. Bank *vs.* Jackson (33 Ch. D., 1, at page 10) it is said:

"Now the rule is that if a person who seals and delivers a deed is misled by the misstatements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all." * * *

Now what was the alleged purpose of the grantor in the case at bar? The answer to this question appears from the statements of the defendants Mrs. La Fetra and Mrs. Tilton in their answers to the bill of complaint and from the testimony of Mr. Forrest.

Mrs. Tilton, answering for herself, says (R., p. 12):

"She further states that during one of her visits upon decedent, the decedent informed her of the provisions made by her in a codicil to her will; * * * that she told her that she intended to execute a deed *to effect the same purpose* which she sought to accomplish by the codicil to her will."

Mrs. La Fetra in her answer says (R., p. 15):

> "On the contrary, she says the truth is, that prior to the execution and delivery of said deed, the said decedent had added a codicil to her will, on the 21st day of February, 1907, *for the purpose of accomplishing the same object* that she sought to effect by the execution and delivery of said deed."

Mr. Forrest testifies on direct examination (R., p. 130):

> "The WITNESS: She said she wanted me to write her a deed, deeding the *two* pieces of property that the will calls for, to Mrs. Huntley and Mrs. Tilton and Miss Fague. * * * After reading the deed over to her she said *she wanted the other house also deeded,* * * * after spending some time with her, and talking over the matter with her, I said I would go back to the office and prepare another deed. I came back to the office and thought seriously over the matter, *after I found out exactly what she wanted,* and I got all the data I had and brought it around to you, Mr. Leighton. I told you the circumstances and facts and *asked you* to prepare the deed *as you saw fit.* The deed was prepared by you. It was then handed to me. I took it to Miss Magaw, read it to her, and left it with her I think a day or two."

On cross-examination Mr. Forrest says (R., p. 139):

> "I can give you some of Mrs. Magaw's words at this interview; in talking about the preparation of the deed, Mrs. Magaw told me that she wanted the deed to confirm the codicil, or words to that effect.
>
> "Q. And your understanding of her idea was that the deed was to be substantially like the codicil? A. Yes, sir.
>
> "Q. And that it was to accomplish the same effect, so far as the two houses were concerned? A. So far as the *three* houses were concerned.
>
> "Q. Oh, the idea was that it was to cover the *three* houses? A. Yes, sir.
>
> "Q. And you think that when Mrs. Magaw signed deed, she thought the deed was accomplishing the

purpose the codicil would have accomplished after her death? A. She thought it would be much stronger, and that it would stand better in the courts.

"Q. It would stand better? A. Yes, sir.

"Q. And it was to carry out the same purpose? A. Yes, sir.

"Q. And it was made to do the same thing the codicil was made to do, except that one would hold better than the other? A. She wanted the deed in her lifetime."

So it appears from the *defendants' explanation* that the grantor's alleged purpose is set forth in the codicil (R., p. 212), namely, (1) to provide a home for Miss Fague and (2) a memorial for herself and husband.

It will be seen that the deed does not conform to either of these purposes:

First. The deed does not provide a home for Miss Fague, nor does it make any other provision for Miss Fague in place thereof.

Second. The deed does not contain any imperative direction for the memorial, but merely a discretionary power to apply the money for that purpose; whether the memorial shall be erected or the money used for other purposes is left to the *discretion* of the society.

Third. The deed cuts down the appropriation for the memorial from $11,000 to $7,400—that is, the memorial shall cost $3,600 less than the grantor intended it should cost; and as the memorial was to be for the grantor and *not for the society* this difference is material in considering whether the deed conforms to the grantor's purpose.

We will now consider separately these points of difference.

The Home for Miss Fague.

The grantor probably had a stronger desire to do something for Miss Fague (the nurse) than to do something for missions. Several of the witnesses say she wanted to assist Miss Fague.

Miss Lewis (who acted as nurse when Miss Fague was in the hospital) testified (R., p. 27):

> "I supposed this paper was an addition to her will for Hettie. Mrs. La Fetra said she was fixing something for Hettie. I supposed that it was an addition to her will, not from any former conversation about it, but only that I knew she wanted to do something for Hettie. I had heard Mrs. Magaw say that, time and time again; she could not say Hettie. She said 'Ettie.'"

And on cross-examination witness testified (R., p. 30):

> "I can't recall when was the first time she spoke to me about doing something for Miss Fague; it was when I first nursed her; she repeated that several times; on several occasions she said so."

Miss Fague also was the grantor's first choice for trustee, according to Mrs. La Fetra's testimony.

Mrs. La Fetra says (R., p. 144):

> "Mr. Forrest said to her that if she gave this property to missions, she had better have some trustees. Mrs. Magaw said: '*I will have Hettie;* she is interested in missions.'"

And Mrs. La Fetra thought it would be better to have two other ladies as trustees, and suggested the names of the defendants Mrs. Huntley and Mrs. Tilton (R., p. 144). Witness continues:

> "Mrs. Magaw said at this time (referring to preparation of codicil), 'I want to give two houses to missions and one to Hettie * * * I want to give that property to Hettie and after her death, to the Fagues; I want to give the property to Hettie for her life.'"

Dr. Custis also testified that she wanted to provide for Miss Fague.

Dr. Custis says (R., p. 171):

> "I knew her will had been made from her general talk, and at one time she became anxious about some provision for Miss Fague, and made it very clear that she wanted to make provision for her, so that she would be provided for during life, and was anxious only, seemingly, as to how she could do it without disturbing that will, without writing a new will entirely."

Again, on cross-examination, Dr. Custis says (R., p. 193):

> "The property she wanted Miss Fague to have was a house. * * * She said she wanted Miss Fague to have it, as I remember it, she specified that. At any rate, she wanted to make special provision for Miss Fague during her life, and then the property to revert to whomever made up the heirs or whomever she might leave it to. She made that distinction clear to me. * * * Mrs. Magaw wanted the provision of that will to stand with the further addition that she might wish to make. That addition was to give a house to Miss Fague during her lifetime and which at her death was to go wherever Mrs. Magaw should provide. That was all she talked about with reference to making a codicil. *She did not talk to me about anything else.*"

Not a word was said to Dr. Custis about missions or a memorial in China.

From the testimony (which is the defendant's explanation) it appears that some provision for Miss Fague was a very important part of the grantor's purpose, and yet the deed does not provide for her at all.

The Memorial for the Grantor.

The purpose of the grantor, as appears from the codicil, was that the proceeds of the sale of the *three* houses were to be devoted to the erection of a memorial for herself and her husband. It was an *imperative* direction to do something

for the benefit of the grantor's name and reputation after her decease. The codicil reads (R., p. 212):

> "The proceeds realized to be used towards the erection of a memorial to my departed husband, Robert Magaw, and myself, either in China or India, the place or location and character of memorial to be decided by the society."

This is positive and imperative so far as it relates to the application of the proceeds to the erection of some memorial. Only the location and character of the memorial were left "to be decided by the society."

The provisions of the deed, however, are substantially different on this point. By the deed, the society may determine, not only the location and character of the memorial, but it is also left to the society to decide *whether or not there shall be any memorial at all.*

The deed contains the following (R., p. 214):

> "The money so paid to said Society *shall be applied* by them, *in their discretion,* in the erection of a building as a memorial to grantor's departed husband, Robert Magaw, and to grantor, Alice D. Magaw, to be used either for the purposes of a church, hospital orphanage, Mission Home, School or some other Missionary purpose, *in the discretion of the Society.*"

This deed was carefully drawn by a distinguished member of the bar of the city of Washington, B. F. Leighton, Esq. (R., p. 130), who is counsel for the defendants in this case; and the words, "in their discretion," we may assume, were used by him in the ordinary sense in which judges and lawyers use those words.

Mr. Forrest testified (R., p. 130) that he told Mr. Leighton to draw the deed as he saw fit—and we think we may also assume that Mr. Leighton followed instructions.

A few examples of the use and meaning of the words, "in their discretion," may be sufficient.

In Bennett *vs.* Norton (171 Pa., 221, 231) the court, in passing, say:

> "*A discretionary power* involves an alternative power, *i. e.*, a power to do or refrain from doing a certain thing."

In a New York case, Parsons *vs.* Best (Thomp. and Cook, 211, 213), the will made an *absolute* devise to testator's wife and then followed this clause: "Subject, however, to a distribution of the same among all my children, *in her discretion,* and when she may deem proper to do so" (p. 213).

Construing this provision, the court say:

> "It can be regarded as only the expression of a wish that *in the exercise of a discretion,* entirely consistent with the devise, that his children may be permitted to enjoy the estate from her, when, in her discretion, she shall determine to make distribution. The word 'subject' does not control the preceding devise, but is controlled by the positive language which precedes it, and the qualification of it by the '*discretion*' which follows it."

In Taylor *vs.* Benham (46 U. S., 233, 267) the court says:

> "One of the tests on this subject is, that a naked power to sell may be exercised or not by the executors, and is discretionary; while an imperative direction to sell and dispose of the proceeds in a certain way, as in this case, is a power coupled with a trust." Citing 7 Dana, 1; 10 Peters, 533; 12 Wend., 544; 2 Story's Eq. Juris., Sec. 1070; 10 Ves., 536.

Therefore, when the deed says that the money "shall be applied by them in their discretion," it means that they have power to apply it or to refrain from applying it to that particular object. They have a discretionary power to be exercised or not as they choose. It is not an imperative direction to be followed at all events.

The Cost of the Memorial.

The three houses are valued at about $11,000, or $3,600 for each house (R., p. 43), and the whole of this $11,000 was to be devoted to the memorial. This appears from the codicil (R., p. 212) and also from the testimony of Mr. Forrest (above quoted), in which he says on direct examination (R., p. 130) and also on cross-examination (R., p. 139) that it was Mrs. Magaw's intention to give the *three* houses for this purpose; he also says (R., p. 139) that when the grantor signed the deed she thought it was accomplishing the same purpose the codicil would have accomplished after her death with relation to the *three* houses.

On redirect examination (R., pp. 141 and 142) Mr. Leighton called Mr. Forrest's attention to the difference between the grantor's purpose and the contents of the deed, and the only explanation Mr. Forrest could give was that he *was under the impression that the deed carried out the purpose of the codicil,* "but on second thought" he remembers *that it does not.* He does not change his testimony as to the grantor's purpose. He simply says the deed does not conform to the purpose.

Perhaps the transaction required the services of an able and careful lawyer, but certainly the grantor had no legal advice or assistance, or any other kind, except from those most interested in securing her property.

We respectfully repeat and submit that the deed, considered as a voluntary conveyance, cannot stand in equity, for the reason that it was obtained by those standing in a confidential relation to the grantor, without independent advice, and does not conform in a material respect to the alleged purpose of the grantor, and as a voluntary deed cannot be *reformed,* it must be ***set aside.***

Mulock *vs.* Mulock, 31 N. J. Equity, 594, 602.
Caspari *vs.* First German Church, 12 Mo. App., 293.
Coutts *vs.* Acworth Law Rep., 8 Eq. Cas., 558.
Huguenin *vs.* Baseley, 14 Vesey, 273.
Grant *vs. Baird,* 61 N. J. Equity, 389.
Gee *vs.* Spencer, Vernon's Ch. R., 32; 13 Cyc., 577.

The Confidential Relation and the Burden of Proof.

Undue influence to overthrow a conveyance *inter vivos* may be inferred from the *mere existence* of confidential relationship such as has been conceded to exist in this case. This relationship affords no such presumption as to wills, unless coupled with proof of fraud or undue influence. The existence of confidential relationship, therefore, in the case at bar, is sufficient to justify the court in inferring undue influence unless rebutted by satisfactory evidence on the part of the defendants.

Ralston *vs.* Turpin, 129 U. S., 663.
Lee *vs.* Lee, 71 N. C., 139.
Bancroft *vs.* Otis, 91 Ala., 287.
Tyson *vs.* Tyson, 37 Md., 583.
Underhill on Wills, vol. 1, p. 207.
Coffin *vs.* Coffin, 23 N. Y., 9.
Baldwin *vs.* Parker, 99 Mass., 79.

We think it will be difficult to find a case in which any person was more dependent upon others than was the grantor in this case. Mrs. Magaw was away from her relatives, without independent adivce, physically helpless from paralysis, blind, 83 years old, and under the care and protection of Mrs. La Fetra, in whom the grantor rightly imposed great confidence (R., p. 114). Mrs. La Fetra had been her friend, had advised her about her affairs, had furnished her with a nurse and with an agent to manage her property. Mrs. Magaw depended upon Mrs. La Fetra for food, medicine, and every necessity and comfort of life as a child would depend upon its mother (R., p. 114). She naturally trusted and relied upon those whom Mrs. La Fetra approved and employed for her. And we understand that Mrs. Magaw's helplessness and dependency upon Mrs. La Fetra and the others is not denied by the defendants.

This court in Holtzman *vs.* Linton, 27 App. D. C., 256, used the following language:

> "In discussing the obligations arising out of fiduciary relations where there is no intentional concealment, no misrepresentation, no actual fraud, Mr. Pomeroy says: 'The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet, because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption. One principle underlies the whole subject in all its applications; and this principle may be stated in a negative and in an affirmative form. Its negative aspect cannot be better expressed than in the following language of a most able judge in a recent decision (Wood, V. C., in Tate *vs.* Williamson, L. R., 1 Eq., 528, 536): 'The broad principle on which the court acts in cases of this description is that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand, unless there has been the fairest and fullest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him.' 2 Pom. Eq. Jur., sec. 956; Moran *vs.* Daly, 12 App. D. C., 137, 146."

The only thing decided in the case of Towson *vs.* Moore, 173 U. S., 17, relied on by the appellees, is that the mere existence of confidential relations, *as in the case of parent and child and some* others of a similar nature, does not shift

the burden of proof to the superior party to show the validity of the transaction.

This court, in the case of Murray *vs.* Hilton, 8 App. D. C., 281, 284, said:

> "Gifts procured by agents and purchases made by them from their principals should be scrutinized with a close and vigilant suspicion."

The case of Critchfield *vs.* Easterday, 26 App. D. C., 94, cited in appellee's brief is hardly a case in point, for in that case the wife made a conveyance to her husband of property which was wholly paid for by his money, and after its transfer to him he made a will giving her the use of it for her life.

In the case of McDaniel *vs.* Parish, 4 App. D. C., a conveyance by a father to a daughter was sought to be set aside by the creditors as fraudulent; but there the findings of the lower court, sustained by this court on appeal, were to the effect that the property was paid for out of the earnings of the daughter pursuant to a contract with her father to manage his household and take care of an invalid mother.

Under the circumstances of this case the burden of proof is upon the defendants to show "*by the clearest evidence,* that the gift was freely and deliberately made," and well understood by the grantor.

Boyd *vs.* De La Montagnie, 73 N. Y., 502, 503.
Shakespeare *vs.* Markham, 72 N. Y., 400.
Caspari *vs.* First German Church, 12 Mo. App., 293.
Huguenin *vs.* Baseley, 14 Vesey, 273.
Cowee *vs.* Cornell, 75 N. Y., 91, 99, 100.
Barnard *vs.* Gantz, 140 N. Y., 249.
In re Smith, 95 N. Y., 522.

In *Shakespeare vs. Markham* (72 N. Y., 400, 403) the court say:

> "Contracts claimed to have been entered into with aged or infirm persons, to be enforced after death,

> *to the detriment and the disinheriting of lawful heirs,* who otherwise would be entitled to their estates, are properly regarded with grave suspicion by courts of justice, and should be closely scrutinized, and only allowed to stand when established by the strongest evidence."

And in *Cowee vs. Cornell* (75 N. Y., 91, 99, 100) it is said:

> "Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, *or from overmastering influence,* or on the other from weakness, dependence, *or trust* justifiably reposed, unfair advantage in a transaction is rendered *probable*, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practised, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled. (Hunt J. Nesbit *vs.* Lockman, 34 N. Y., 167; Story's Equity Jur., sec. 311; Sears *vs.* Shafer, 2 Seld., 268; Huguenin *vs.* Basely, 13 Ves., 105; S. C., 14 *id.* 273; S. C., 15 *id.* 180; Wright *vs.* Proud, 13 *id.* 138; Harris *vs.* Tremenheere, 15 *id.* 40; Edwards *vs.* Myrick, 2 Hare, 60; Hunter *vs.* Atkins, 3 My. & K., 113.) And this is, I think, the extent to which the well considered cases go, and is the scope of 'constructive fraud.'"

In Boyd *vs.* De La Montagnie (73 N. Y., 502, 503) it is said:

> *"It is not found that the defendant acted with a fraudulent intent in procuring the transfer, but I do not understand that this is necessary to be affirmatively shown in this class of cases.* A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence over the conduct of another. A husband occupies such a re-

lation to the wife, and the equitable principles referred to would apply to them in respect to gratuitous transfers by the wife to the husband, however it might be in oridnary business transactions, which the wife may legally engage in. When this relation exists the person obtaining the benefit must show, by the clearest evidence, that the gift was freely and deliberately made. The burden is upon the person taking the gift to show that the transaction was fair and proper. (Sears *vs.* Shafer, 6 N. Y., 268; Hoghton *vs.* Hoghton, 15 Beav., 278; Ford *vs.* Harrington, 16 N. Y., 285; 2 New Rep., 384; Coutts *vs.* Acworth, L. R., 8 Eq., 558-567; Burnaby *vs.* Griffin, 3 Vesey, 266.)"

"Story says: "Hence, the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void, which, between other persons, would not be held objectionable. It does not so much consider the bearing or hardship of its doctrine, upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means, secret and inaccessible, to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties" (Story's Eq. Jur. 310). A misapprehension of a party may be sufficient (Gee *vs.* Spencer, 2 Ves., 401, and note). Lord Eldon, in Huguenin *vs.* Baseley, 14 Vesey, 273, says, that "When the decision rests upon the ground of public utility, for the purpose of maintaining the principle it is necessary to impute knowledge which the party may not actually have had."

The same rule applies where the parties who procured the deed take no benefit under it.

Whelan *vs.* Whelan, 3 Cowen, 537, 576 (N. Y.).

Bennett *vs.* Wade, 1 Dickens 84.

Huguenin *vs.* Basely, 14 Vesey Jun., 289.

Caspari *vs.* First German Church, 12 Mo. App., 293.

The appellees in their brief (p. 49) use the following extraordinary language: "In no court could the deed be treated as wholly void and set aside, but only to the extent of his (appellant's) interest in the property, which is an undivided one-sixth interest." No authority has been cited to sustain this contention. It is believed the correct rule is laid down in Whelan *vs.* Whelan (3 Cowen, 537, 576). The New York Court of Errors say:

> "The next question is whether the fraud of William in procuring the deed, renders it void as to Joseph, the other respondent. It is a general rule, that in ordinary cases of fraud, equity undoes the whole transaction, and replaces the parties in their former situation (Daubney *vs.* Cockburn, 1 Mer., 644)."
>
> "The case of Bennnet *v.* Wade, (1 Dickens, 84), is very much in point. The facts were briefly these: Sir John Leigh was seized of a large real estate; his mind was so weak, that he was easy to be imposed upon; the defendant was a surgeon and apothecary, who attended him, took advantage of this weakness, and prevailed on him, then aged sixty, to marry Wade's daughter, aged sixteen, and to execute a settlement in favor of his daughter. The daughter dying soon after, Wade obtained a will from Sir John in his favor, and also indentures of lease and release as he alleged in consideration of the will. After the testator's death, Wade set up the deeds, under which the defendants claimed beneficially and they entered on the estates. A part of the estate was conveyed to Wade in fee; a bill was filed to set aside the deeds, and a cross bill to establish them. It was argued on the part of the plaintiffs that whatever fraud or imposition had been practised on Sir John Leigh, by the defendant Wade, they were not privy to, or concerned in it; that it would be hard to involve the innocent with the guilty, and punish them, by setting aside the deeds *in toto*. But Lord Hardwicke was of opinion, that the deeds were founded in fraud; and being so, it vitiated the whole; that they were obtained from Sir John Leigh, by fraud, imposition and circumvention, by means of the undue influ-

ence of the defendant Wade over his weakness; and that the same ought to be set aside. This case fully establishes the principle, that the respondent Joseph cannot be protected." * * *

"In Huguenin *vs.* Basely, (14 Ves. Jun., 289), the same doctrine is recognized. Ld. Eldon observes, 'I should regret that any doubt could be entertained, whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition or undue influence of others' * * * "This last cause afterwards came before the Lords Commissioners, and Lord Chief Justice Wilmot expresses himself thus: 'There is no pretence that Green's brother or his wife, was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No. Whoever receives it must take it tainted and infected with undue influence and imposition of the person procuring the gift. His partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it (Wilm., 64; 14 Ves., 289).'

"It is unnecessary to pursue this doctrine through all the cases, to be found in the books. It is believed that the rule is firmly established. If it were otherwise, that a person could evade the principle, by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud. The deed, then is bad *in toto*, and must be set aside as to both the respondents."

The Incompetency of the Grantor.

Thus far we have considered the deed as a voluntary conveyance, made without consideration, and without independent advice, and which does not conform in a material respect to the alleged purpose of the grantor. We have also endeavored to show that there existed a relation of trust and

confidence between the grantor and grantees, and that by reason of such relation, the burden was upon the grantees to show that all was well understood by the grantor.

We have shown that the deed does not conform to the purpose of the grantor and therefore it could not have been understood by her. We will now endeavor to suggest a very good reason why the deed does not conform to the alleged purpose of the grantor, namely, that the grantor was mentally incompetent to understand the deed. The admissions made by the defendants and their witnesses show, conclusively, we think, that the grantor was wholly unfit to do any business at all. The defendants' *admissions* wholly *destroyed the value of their opinions* as to the grantor's condition.

It will be seen from reading the testimony that the defendants all say that while Mrs. Magaw used some words strangely, that her mind was clear and that they, the defendants, could understand her meaning. But they admit that others probably could not understand the talk of the grantor, and thus they corroborate the testimony of the complainant's witnesses, who say they could not understand what the deceased was trying to say.

There is no doubt whatever from all the testimony that Mrs. Magaw was old and feeble, blind and helpless and suffering from a disease of the brain, from which she was likely to die at any time (R., p. 176), and *that it was very doubtful in the minds of those around her,* whether she was capable of understanding business transactions. This is clearly shown by the testimony of the hotel proprietor, Edwin S. La Fetra, who witnessed the execution of the deed. Mr. La Fetra says (p. 154):

> "I knew I was to be a witness, and I felt probably that was one of the things I should witness, whether she knew what she was doing, because she could not speak very clearly and so she could not say as directly as another person might that she did understand every word of it, *and had to make it known in*

her own way." * * * "At the time this deed was executed she could speak some words plainly, but could not speak a whole sentence plainly. She would become confused somewhere in the sentence and would miss the correct word. Sometimes she would use another word than the one she wanted" (R., p. 155).

On cross-examination the witness said (p. 155):

"She would start in a sentence and get the wrong word after a bit. I recall especially one word, the word 'promise.' She would say things were 'promise.' If she wanted a thing she called it 'promise', and it might be she was wanting her companion, or it might be she wanted something in the way of eating, or something else, and that word would come up.

"Q. So that in using that word she might have meant one thing or meant another, different things at different times? A. She did mean one thing and did mean another.

"Q. She did not mean the same thing? A. No. * * * (P. 155).

"Q. When you were called in as a witness, you felt she ought to show she understood what she was doing, in order that you should be an intelligent witness to the transaction, did you not? A. I did. I personally did nothing to find out that she did know what she was about, except to listen to the conversation between herself and Mr. Forrest, who read the deed to her. I felt in my own mind that I should be convinced that she did know what she was about. If I had made up my mind that she did not know, I would have refused to sign it.

"Q. Did you go there with that intention in your mind? A. To sign it?

"Q. No, to refuse to sign it if you found that she did not know what she was doing? A. I cannot say that I did. I simply went in to sign the deed if she understood it. I went there with the expressed intention to sign it in case she understood it. You might take the converse as true. I did not presume it was so. I say it is on account of the difficulty in speech that I felt this was necessary. I knew in

other things—I felt sure she understood what she was about." (R., p. 156). "I think her vision was dim at the time of the signing of this deed. She was not able to read" (R., p. 156).

At this point we desire to refer to a standard authority on the capacity of an aphasic patient, namely, "1 Wharton and Stille on Medical Jurisprudence." We quote from section 1012:

> "The testamentary capacity of an aphasic patient must be judged entirely by the intelligibility with which he can make himself understood. As a legal question it matters not whether the patient knows what he wants to do, if he has not the ability to make his wants known. This is his misfortune; it is a part of the calamity which disease has brought upon him, and one which may excite the liveliest sympathy and solicitude in his friends; *but so long as he cannot indicate by language, signs, gestures, or any means whatever,* what he desires to devise, the law obviously cannot help him. The ability to make a will implies the ability to make one's wishes known; and whatever refinements are evolved on the subject of testamentary capacity, certainly no court would decide that capacity could exist apart from the capacity of expression in some form."

Dr. Custis, her physician, says (R., p. 192) that those who were closest to the grantor were able to understand her better than he could, and that he himself was better able to understand her than some others might be.

> "Q. You are not surprised that a stranger coming in to talk with her might not understand what she meant. A. No, that would be very natural." This applies to the last six or eight months of her life (R., p. 192).
>
> "Q. If you were in the room and a stranger should come in and read a letter to Mrs. Magaw *about her business affairs,* what evidence would there be that Mrs. Magaw understood the reading of the letter? A. I do not think there would be any evidence excepting

her reply to it, or her expression in some way in reply to it. Anybody might come in and read to a person that was perfectly sane a letter. You might or might not know by observation whether they understood it all and were conscious of its contents or not. There is nothing but observation and the attention to replies that might be made" (R., p. 192).

"Q. Would you not think that there was a possibility that she might not have thoroughly understood all of the letter? A. In the case of Mrs. Magaw, a person coming in and reading to her a letter of that kind, *I would think that possibly she might not take it in at once, or its significance*" (R., p. 192).

But the Doctor adds that, in his opinion, Mrs. Magaw might be made to comprehend it by an explanation (R., p. 192).

Referring to Complainant's Exhibit No. 3 of October 9, 1908 (also known as Exhibit No. 63—see R., p. 218—and stipulation relating to the production of *original exhibit* before this court, R., p. 237), Dr. Custis testified (R., p. 188):

"Q. I show you Complainant's Exhibit No. 3, filed October 9, 1908, and ask you whether that is a sample of letter written by a person perfectly sane and in a normal state of mind? A. I would not say it was an evidence of insanity. I would say it showed a lack of power of expression of her thoughts. (Question repeated.) A. The person might be perfectly sane, but not in a normal state. * * * (Question repeated.) A. If I should answer that yes, or no, it would intimate that Mrs. Magaw, who wrote that letter, *was not in a sane or normal mind*" (R., p. 188 and 189). The Doctor insists that he believes she was sane, but adds, "Her mind might possibly have been weakened by the defects of age. * * *

"Q. Is that such a letter as you would expect Mrs. Magaw to write in her condition? A. I never saw a letter from her before, but I would have expected her, *probably,* to do a little better than that."

He is surprised to find that she did not do any better in this instance (R., p. 189).

> "Q. You are not willing to say that this letter is a sample of a letter written by a person who is perfectly sane? A. *I am not willing to say* that it is a letter written by a person *whose entire mental faculties were in a normal condition.* I want to keep in my mind the distinction in my reply between a *general dementia*, and that which is the abnormal condition which is connected simply with aphasia, the local condition of the brain" (R., p. 189).

Dr. Custis also says (R., p. 175):

> "Q. What is dementia? A. Put in the plainest terms, dementia is a disturbance of mentality. *A person who is demented is not in his right mind, he is not capable of safely attending to his business affairs*" (R., p. 175).
>
> "Q. Do physicians possess any secret or unusual means of discovering whether a person is demented that ordinary persons do not possess? * * * (Question repeated.) A. Well, I should be tempted to say no with an explanation. I cannot answer it safely or truly without an explanation. The tests used by physicians to determine dementia are, simply, an observation of the patient's appearance, speech, the intelligence that is manifested in answering questions, their comprehension of the significance of things immediately around them" (R., p. 174). * * * "You can ask questions of them and judge by the character of the answers" (R., p. 174). * * * You could hardly call them physical tests for the purpose of determining whether the patient comprehends things around him. You can ask questions of them and judge by the character of the answers. If they are unable to answer, it is a pretty fair evidence that there is a lack of mentality" (R., p. 174).
>
> "Q. And you judged from ordinary observation of her and her demeanor,, and her answers to your questions? A. Yes" (R., p. 186).
>
> "Q. And yet you are not able now to give me any

questions you asked her, or any answers she made? A. I would ask her, as I would any patient, the general questions as to the condition of her health, as to the condition of her head, stomach or heart" (R., p. 186).

"Q. But you cannot give me her specific replies to any questions that you asked her? A. *Excepting that she never complained of any trouble* beyond the embarrassment in her speech. That annoyed her very much" (R., p. 186).

"Q. But you, yourself, as a physician, had no way of determining from her speech, or aside from her speech and her appearance and her actions, whether she was demented or not? A. *No, and I do not know that anybody else has*" (R., p. 186).

"Q. You acted upon the assumption in all your treatment of her, that there was no dementia? A. Yes, sir. I did not *at any time* carefully and conscientiously from a medical standpoint, apply all the known tests to determine whether Mrs. Magaw was in any way affected by dementia. I applied no special tests. My general conversation and observation convinced me, without going into any critical tests which would simply have been confusing to a person of her age and condition. I have no unusual or cryptic or secret method of determining whether a person is affected by dementia, which an ordinary person has not. I think a person of general intelligence, without being trained as a physician, could determine whether there was dementia or not by the character of answers to questions, by calling their attention to particular objects and seeking to ascertain their names and uses, etc. There is no physical test that I am aware of. It is a matter of general intelligence. A layman of equal intelligence to myself could determine whether a person was demented or not as well as I could" (R., p. 177). * * *

Certainly this testimony is not affirmative proof that the grantor understood the meaning and purport of the deed.

On the other hand, Dr. Oscar H. Coumbe, of 248 Delaware avenue, Washington, an impartial witness, who ex-

amined the grantor at the request of Mrs. La Fetra (R., p. 86), and who saw the grantor many times up to May 1, 1907, when his patient, Mrs. Love, left the hotel (R., pp. 87 and 77), says, referring to his first examination in 1905:

> "I found Mrs. Magaw in a condition of what might be termed senile degeneration of the brain, and softening of the brain. Her blood vessels were atheromatous. Her heart and pulse beat slow, about 60 to the minute. In trying to talk to the old lady I could not get her to connect more than about three words at a time, and even that was very incoherent and unintelligible, frequently interrupting it with such words as 'spirit,' 'kingdom,' 'mercy,' and a word she used very frequently, 'trouble.' * * * There was a decided drawing on one part of her face. Her condition was very childlike. She seemed to be easy to follow one's directions. Some things she appeared to understand, and some things she did not appear to understand, and didn't seem to grasp them at all" (R., p. 87).
>
> "Q. From your whole observation of Mrs. Magaw at all these times, what would you say as to her capacity for attending to business affairs? A. *Why, it was absolutely certain that she could not attend to business at all, didn't attend to any business*" (R., p. 88.).

On cross-examination Dr. Coumbe says:

> "I have three similar cases under observation at the present time. One is a gentleman 84 years of age. It involves the mental faculties necessarily, but not always in the same degree. This man that I just spoke of has been of a homicidal and suicidal tendency. It depends upon the stage of the disease as to whether or not the faculties are so involved as to prevent doing business" (R., p, 90). * * *
>
> "I have never known a party that was afflicted with aphasia to recover from it entirely. It is a progressive disease. Always gets worse. All authorities say that (R., p. 90). * * * If persons have aphasia as the result of a blood clot on the brain they certainly are mentally disqualified from attend-

> ing to their business affairs and making a deed or will—I know she did not understand the nature of the business in hand from the time I made an examination of her, because she was so obscure and incoherent in her speech and in her manner and in her action" (R., p. 90).

Here is the testimony of two physicians, both of whom examined the grantor in her lifetime and observed her about the time of the execution of the deed—May, 1907—and we submit that the testimony of Dr. Coumbe certainly balances the weight of Dr. Custis' testimony, if it does not outweigh it. Dr. Custis was a vitally interested witness. He had expressed his opinion from the first that the grantor was not demented (R., pp. 180, 181), and insisted upon his treatment and his opinion although Mrs. La Fetra and others thought the grantor ought to go to an asylum for the insane (R., pp. 195, 196). Very naturally Dr. Custis does not wish to admit that he was in error and refuses to do so, although his testimony as to *facts* shows that the grantor was in a very feeble condition and was likely to die at any time (R., p. 176).

And in view of the fact that the veracity of Dr. Custis is involved, we may refer to another part of his testimony which shows that the Doctor is not above misrepresentation, when he thinks it safe.

Dr. Custis was asked (R., p. 190):

> "Q. What did you do *immediately* previous to your practising medicine? A. Immediately preceding that I was in the *railroad business.* * * *
>
> "Q. Were you ever employed in any position in Washington? A. *Away back in the early days* I was an engineer in the heating and ventilating department of the United States Senate—for a short time—I do not remember how long (R., pp. 190 and 191).
>
> * * *
>
> "Q. How long were you in the Capitol immediately before you started to practice medicine. A. I cannot tell you. *Three years,* about, I guess" (R., p. 191).

First he says he was in the railroad business immediately previous to practising medicine, but upon being pressed he admits that he spent three years as assistant engineer in the Capitol. He also said, *at first*, that this was "away back in the early days" (R., p. 190), but it appears that he was 78 years of age at the time of the trial (R., p. 190), and had practised medicine 20 years, so that "away back in the early days" was when he was over 50 *years of age.*

Dr. Custis says he did not notice an atheromatous condition of the grantor's blood vessels: "I did not specially examine to ascertain" (R., p. 176). This condition is a very important factor in determining whether there was softening of the brain, and Dr. Coumbe (R., p. 87) and Dr. Zabriskie (R., p. 49) both say from personal examination that this condition existed.

Dr. Custis also certified in the death certificate (R., p. 215) that the primary cause of death was thrombosis, whereas on the trial he says it was embolism, and says there is a decided difference.

In view of these inconsistent statements of Dr. Custis, we think his credibility as a witness has been impaired, and that so far as the proof of the grantor's mental condition rests upon the testimony of Dr. Custis alone it should be held insufficient, for the proof must be full and convincing in order to sustain the burden of proof, which is upon the defendants in this case.

We will now refer briefly to the testimony of other important witnesses bearing upon Mrs. Magaw's condition.

First, we refer to *Mrs. Anna Love* and her daughter, *Miss Belle Love,* who lived very close to Mrs. Magaw on the same floor until May, 1907, when they left the hotel. These people are not related to the grantor and are entirely impartial. *Mrs. Love* says (R., p. 77):

> "During the last year or two that I was at the hotel I saw Mrs. Magaw sometimes once a day and sometimes more. Almost every day except one time

when I was sick. * * * From the 1st of January, 1907, until I left the hotel, Mrs. Magaw was in very feeble health. Dr. Custis told me it was a clot of blood on the brain. During this time, in 1907, we couldn't carry on a very lengthy conversation with her. She was not in a condition to talk much. Toward the latter part of our visits, Miss Fague would say 'These are your best friends' when my daughter and myself would go in there. She didn't seem to know us at first, but afterwards recognized us" (R., p. 77).

Witness continues (p. 78):

"I remember the fact that she executed a deed. I remember the occasion of hearing about it."

"Q. What was Mrs. Magaw's condition then, as compared with her condition a few months before? A. Well, I thought she was in a very feeble state.

"Q. Mentally as well as physically? A. Yes."

Referring to the time of the execution of the codicil, witness says (p. 78):

"At that time Mrs. Magaw was in a very feeble state I thought. In my opinion, at that time she was not capable mentally of transacting business or of making a valid will. I saw her in the evening of that day. She was in her room. I observed nothing unusual. She tried to talk as usual. I didn't understand anything that she said" (p. 78).

Referring to a conversation with Miss Lewis (nurse), the witness says (p. 79):

"Q. Did you tell her why? A. Well, she knew why, that the old lady was not in condition to have her will tampered with. When Mrs. La Fetra asked me to be a witness to the codicil I told her why I did not care to be a witness. I told her I thought it would make trouble. I don't remember that there was anything else said. *Mrs. La Fetra replied that she couldn't help it if it did*" (p. 78).

And the defendants do not deny these statements. *Miss Belle Love* says (p. 82):

> "During the last year I was at the hotel I saw Mrs. Magaw two or three times a day. She sometimes came to our room. Her condition, mentally and physically, as regards her strength or feebleness during that year before I left the hotel, was very feeble. She was failing constantly; she couldn't walk with as firm a step as formerly, and she was not able to go to the dining room, as she had been before, and her meals were served in her room" (p. 82).

Caroline F. Wolfley, 31 years of age (p. 101), clerk in a Government office (p. 101), who knew Mrs. Magaw intimately (p. 98), although not related to her, testified (p. 99):

> "Q. Did you observe any sign or motion or word or action of any kind on the part of Mrs. Magaw which indicated that she understood what you said to her at any of these times? A. No, I don't think I did. * * *
>
> "Q. At any time, from the time of her first attack in 1905 until her death, were you able to converse with her and understand what she tried to say? A. Well, I always tried to converse with Mrs. Magaw, but I never felt that she understood what I said, and she certainly never conveyed to me what she meant" (p. 99). Witness continues (p. 101): "I say Mrs. Magaw was not capable of attending to any business; I mean she was neither physically nor mentally capable. She didn't know what she wanted, or what she desired to do. That is my idea."

Mrs. Mary H. Williams had known Mrs. Magaw in Washington many years and saw her last in March, 1907 (p. 92). Witness says:

> "Her condition then as compared with her condition formerly was that she was very weak indeed. I didn't think she was as able to talk or to express herself at that time. I tried to talk with her. I talked to her just like I generally did, and laughed about

different things, and she said very little at the last time I saw her. I went again and they had taken her out riding and I didn't see her then. I do not know whether she recognized me" (p. 92).

And on page 93 the witness says she does not think Mrs. Magaw knew what she intended to say in March, 1907.

Frank M. Smith is the husband of a granddaughter of Mrs. Magaw. He is a merchant in New York and his testimony is clear and convincing. He says (p. 33):

"I have never been able to satisfy myself that grandmother knew me when I came or when I left. I refer to this second visit on Palm Sunday of this year, 1907. * * * I thought she was childish, and if there were passing thoughts or expressions she wanted to say, she, at least, did not express them. * * *

"Q. In your opinion did Mrs. Magaw at this time have mental capacity to attend to or manage any business matter? A. The fact that she did not know her own grandchild, in my opinion, that fact that she did not know who I was, nor did definite explanation show that she knew who I was, she certainly had no capacity for attending to any affairs" (R., p. 33).

John E. Mitchell (a witness for the defendants) testified about a transaction with Mrs. Magaw in May, 1907 (R., p. 159), in which she signed some paper and he certified her acknowledgment of it. He says he read over the paper to her, but does not know whether she knew the nature of it (R., p. 160). He did not read every word of the paper—he never heard of such a thing—but he explained it to her (R., p. 160). She seemed more feeble than witness had seen her before (R., p. 159), and the only way the witness could tell that she understood the contents of the paper was by her assenting to it, and saying in effect she guessed it was all right (R., pp. 160 and 161).

Marietta Tasker (a witness for the defendants) testified that she was acting superintendent of the Deaconess' Home

in Washington (R., p. 165) that Mrs. Magaw was "old and feeble" (R., p. 166), and that she could not always understand what Mrs. Magaw tried to say. The witness says (R., p. 167):

> "In my endeavor to understand what she meant, I did not use any special test; if I did not comprehend, I would not trouble her by questioning her, I let it pass. I think Mrs. La Fetra was able to understand her better than I was, because she was with her a great deal more. I think that those who were with her most could understand her best. That is for the reason that in order to understand her I think you had to know something *more than the bare words that she used*" (R., p. 168).

And yet the witness says she had no method of discovering whether Mrs. Magaw's mind was clear or not except from her words (end of p. 168).

Judge Robert E. Doan (R., p. 196), a lawyer, judge and Representative in Congress, who resided at the La Fetra Hotel and saw Mrs. Magaw frequently, was called as a witness for the defendants. He is doubtful about Mrs. Magaw's ability to do business safely.

He says (p. 198):

> "I do not think that Mrs. Magaw at that time (February, 1907) was able to conduct business affairs entirely by herself. I do not think she could run a department store, or do general business, but in limited matters in a way. * * * But in her own little matters that she thought over and determined, I would say there would be no question about her ability.
>
> "Q. If she had been your mother would you not have thought it a little safer to attend to matters for her? That is, outside matters? A. In that respect I would say, 'Mother, you cannot do this'" * * * (R., p. 198).

The witness also referred to the difference between the de-

gree of competency necessary to make a will and that necessary to make a valid contract. He says (p. 199):

> "In that view I will be more certain of her competency to make a will *than to make a contract,* because I have been educated to believe that a contract presupposes a bargain and sale which has two parties to it, both of whom are trying to get the better of it."

Mrs. Lydia H. Tilton, one of the defendants, gave most remarkable testimony (R., p. 119). From what Mrs. Tilton says it appears that none of the other defendants knew much about Mrs. Magaw. The others say she had difficulty with her speech until her death, but Mrs. Tilton refers to a time in February, 1907, when Mrs. Magaw talked perfectly naturally, and could even distinguish the features shown on a large map (R., p. 126), although the others say that she was blind and could not see to read. But on cross-examination witness admits that in May, 1907, that a person who had never talked with her before would have experienced some difficulty in knowing at once what she meant when she talked (R., p. 125).

Charles M. Forrest, who drew the deed and who had charge of her real estate and advised her about investing $1,500 on mortgage, testified (p. 140):

> "I knew she was elderly, I knew she was a sick woman. From the time I took care of her affairs until her death she needed some one to look after her affairs; she could not go out and look after repairs and collect rents."

And at p. 138 witness says:

> "Q. Was it difficult for you to understand what she meant or was it difficult for her to understand what you meant? A. She could understand what I meant a great deal better than I could understand exactly what she meant."

The testimony of *Dr. Wilfred M. Barton,* of Washington, is very important and will be found at page 101. Dr. Barton has been called to testify as an expert alienist in many cases, and as his testimony is very brief we respectfully ask the court to read it carefully.

Dr. Barton did not know Mrs. Magaw, but answered a hypothetical question. No objection was made to the question by defendants' counsel and the Doctor's answer must be taken for what it is worth. He says such a person as described in the question was suffering from softening of the brain and that her condition would entirely annihilate the normal condition of the brain, and that dementia is a very common sequel; also that she would be incapacitated to manage any business affairs in a sane or proper manner.

Charles E. Banes (a witness for complainant), engaged in the real estate business in Washington, knew Mrs. Magaw many years. Referring to his last visit within a year before her death, he says: "She was out of her mind" (p. 74).

Exhibit No. 63.

We desire especially to call the court's attention to Exhibit No. 63 (also known as Exhibit No. 3 of October 9, 1908.) This original exhibit is produced in this court for the reason that it could not be copied owing to the incoherency of its composition. This letter is in the handwriting of the grantor (R., p. 67), and was found among her papers in her room after her death (R., p. 67), and it is identified by Dr. Custis (R., p. 188), Mabel W. Magaw, her granddaughter (R., p. 71), and Matilda W. Magaw, her daughter-in-law (R., p. 67), and her son, Van Brunt Magaw (R., p. 43).

And it is not denied, explained or impeached by the defendants.

Complainant's Exhibits Nos. 62 and 63 are two letters written by the grantor, No. 62 having been written on Jan-

uary 17, 1905 (R., p. 216), before her stroke of paralysis, and No. 63 (R., pp. 218 and 237) having been written after her stroke (R., p. 67), and we submit that a comparison of these letters will show almost beyond a doubt that a great change had taken place in the grantor's mental capacity at the time Exhibit No. 63 was written.

These two exhibits were first marked "for identification" as Exhibits Nos. 1 and 2 of May 22, 1908 (R., p. 43), and when offered *in evidence* they were marked Exhibits Nos. 2 and 3 of October 9, 1908 (R., pp. 96 and 97), and are referred to in the testimony by these words and figures.

Deposition of Van Brunt Magaw.

(R., pp. 221-226.)

On the trial of this case the defendants argued that the words and actions of Mrs. Magaw's children and grandchildren during her lifetime prove that they did not then consider her incompetent to manage her affairs. The defendants especially refer to the fact that her son, Van Brunt Magaw, collected and paid over to her by check the sum of $1,200 which belonged to her and declined to have anything to do with investing the money himself.

The defendants wanted Van Brunt Magaw to explain this transaction, and they examined him by taking his deposition in New York and then offered his deposition in evidence *as a part of the defendants' case.*

We respectfully submit that Mr. Magaw's explanation is full and satisfactory and disposes of the proposition that he thought his mother was fit to manage her affairs. And in fact *she did not manage her affairs herself* after she was stricken in August, 1905; her rents were collected by Mr. Forrest and the repairs made by him and paid for by him out of the rents collected; her accounts were kept by Miss Fague or Mrs. La Fetra; her checks were drawn by these de-

fendants, and the deposits of money and checks were taken to the bank by Miss Fague. Mrs. Magaw never wrote any letters after August, 1905, except the unintelligible letter Exhibit 63, the original of which is before this court.

An investment of $1,500 was made for her by her agent, Forrest, upon property which very soon came under his own control. All the business that Mrs. Magaw did was to attempt to sign her name or make her mark on checks and on the codicil and deed under the immediate direction of Mrs. La Fetra, Miss Fague and Mr. Forrest, and there is absolutely no evidence tending to show that Mrs. Magaw understood the purport of any paper she signed after her first stroke of paralysis, in 1905.

Second Assignment of Error.

The court erred in denying the application of the complainant for leave to amend the bill of complaint (R., p. 232).

The application was made to conform the pleading to the proof. The complainant did not know and could not have known all the facts relating to the confidential relations until they were disclosed by the defendants themselves. The facts brought out certainly make a case for equitable relief, and we respectfully submit that the complainant should be allowed to make his bill of complaint as broad as the testimony of the defendants themselves and of their witnesses.

It is conceded that the allowance or the refusal of an amendment is within the discretion of the trial court, but wherever this court, upon a review of the evidence, finds equities in the record deserving of protection, which would probably be barred in any other proceeding by the defense of laches or limitations, it would remand the cause with leave to the complainant to amend, subject to whatever conditions might be imposed by the lower court.

Johnson *vs.* Elkins, 23 App. D. C., 486.

When it appears that the complaint or declaration can be made good by amendment the appellate court has power to remand with leave to amend.

Goodman *vs.* Nilback, 102 U. S., 556.

The appellant only sought leave to amend his bill in respect of the allegations of undue influence, and it is believed that such an amendment should have been allowed. Apart from this question, and apart from any application in the lower court, if this court should be of the opinion that the evidence shows a total lack of capacity in the grantor, then upon the authority of the above case this court, it is submitted, would have no difficulty in directing an amendment which would make the allegations of the bill conform to the proof. It is believed, however, that the evidence shows such an impaired state of mental capacity, aside from the question of a *total lack of capacity,* that undue influence as contemplated by law in relations of this character is abundantly established.

Third Assignment of Error.

The court erred in dismissing the complainant's bill of complaint and the decree should be reversed; the deed should be annulled and set aside as not being the act and deed of the grantor.

E. Hilton Jackson,
Solicitor for Complainant.

Francis Stockton McDivitt,
Of Counsel.

FILED
APR 11 1910
Henry W. Hodges,
Clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1910.

No. 2109.

ROBERT MAGAW, APPELLANT,

vs.

AMELIA E. HUNTLEY, LYDIA H. TILTON, HETTIE H. FAGUE, INDIVIDUALLY AND AS TRUSTEES OF THE WOMAN'S FOREIGN MISSIONARY SOCIETY OF THE METROPOLITAN MEMORIAL METHODIST EPISCOPAL CHURCH, ET AL.

BRIEF FOR APPELLEES.

B. F. LEIGHTON,
Attorney for Appellees.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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BRIEF FOR APPELLEES.

Statement of the Case.

On October 8, 1907, the appellant, hereinafter called plaintiff, exhibited his bill in the court below against the appellees, hereinafter called defendants, praying the cancellation of a certain deed therein set out.

The bill states that on the 28th day of May, 1907, the defendants, Amelia E. Huntley, Lydia H. Tilton, Hettie H. Fague, and Sarah D. La Fetra, procured one Alice D. Magaw to execute and deliver unto the said three first-named parties, trustees of the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of the city of Washington, District of Columbia, a deed conveying unto them two certain lots

of land situate in said city and District; that said trustees caused said deed to be recorded the same day among the land records of said District. While a nominal consideration was expressed in said deed, there was no consideration, in fact, given therefor. Said deed is filed as an exhibit to said bill and is in evidence in the case.

The bill avers that the said grantor died at said city of Washington, on the 10th day of August, 1907, at the age of 83 years. Plaintiff sues in his own right, *as her grandson and one of her heirs at law.* He makes parties defendant to said bill, decedent's sons, Van Brunt Magaw and Frederick L. Magaw, and also Stephen Magaw, grandson of decedent and brother of plaintiff. He avers further that he and the said last-named defendants are tenants in common of said real estate, and that the said Van Brunt Magaw, Frederick L. Magaw, and Stephen Magaw were made defendants, *because they refused to join as complainants.* The bill further avers that the said decedent, and the defendants Huntley, Tilton, Fague, and La Fetra were members of the said church and missionary society; that because of said affiliations and associations relations of intimacy and confidence subsisted between the decedent and said defendants, both at the time of the execution of said deed, and for some time prior thereto. Plaintiff avers further that at the time said deed was executed, and for a long time prior and subsequent thereto, decedent was in an enfeebled condition of mind and body, and was thereby rendered readily susceptible to influences exerted or attempted to be exerted by others; that the said defendants, well knowing the aforesaid condition of said decedent, and with the intention of cheating and defrauding the heirs at law of said decedent out of their share of the aforesaid property, *and taking advantage of their close and intimate relations with the decedent, procured her to execute and deliver said deed without the knowl-*

edge of said heirs at law, and thereafter placed the same on record (Rec., pp. 1, 2, 3, 4, and 5).

The defendants, Hettie H. Fague and Sarah D. La Fetra, answered separately. Amelia E. Huntley and Lydia H. Tilton filed a joint answer to said bill. All of said defendants deny that said deed was procured by undue influence or fraud of any kind. Two of them, Hettie H. Fague and Amelia E. Huntley, aver that they did not know of the execution of said deed until they saw an account of its being recorded in the daily papers. Defendants deny that Alice D. Magaw, the maker of said deed, was in such condition as to render her susceptible to influence exerted upon her by others; on the contrary, they state that she was a woman of strong will and purpose; that she knew her own mind, and would yield to no one. Lydia H. Tilton, one of the defendants, states that during one of her visits to decedent, she informed her of the provisions made by her in the codicil of her will. This was the first information of any sort that defendant had of the purpose or intention of decedent; that decedent also told said witness, that she intended to execute a deed to effect the same purpose which she sought to accomplish by the codicil to her will. The defendant, Sarah D. La Fetra, states in her answer that the deed in controversy was the free and voluntary act of said decedent, made of her own motion, and without suggestion on the part of said defendant. All of said defendants deny that said decedent was a member of the Metropolitan Memorial Methodist Episcopal Church of Washington, but admit that she was a member of the Woman's Foreign Missionary Society of said church, of which they are also members; but they all deny that because of such membership, any such close relations of confidence and intimacy existed between defendants and decedent, as would influence the execution of said deed; that such statement is wholly untrue. That decedent

was a woman of strong mind and will, and not easily moved from her purpose (Rec. pp. 6 to 17).

The general issue was pleaded to defendant's answers and voluminous evidence was taken in the case. It came to a hearing in due course, and was by decree of June 7, 1909, dismissed with costs, from which decree plaintiff has brought the case to this court by appeal.

First. Plaintiff's first assignment of error need not be separately discussed; it is general in character, and its validity depends wholly upon his last three assignments of error. If these, or either of these, are well assigned, then the court erred in dismissing plaintiff's bill; otherwise the decree ought to stand.

Second. Plaintiff's second assignment of error deserves little consideration; it is difficult to conceive of it as seriously intended. Plaintiff's application to amend his bill was properly refused. The case stood ready for trial, and was heard on the day of the application. It was made on the 26th day of May, 1909; the decree dismissing the bill was passed June 7th of the same year. The amendment sought to make Charles M. Forrest one of the defendants, for the sole purpose of mulcting him with costs; no other relief was or could be asked against him. The title to the property was not in him, but in the defendant trustees named in the deed in controversy. Plaintiff did not ask to have the case continued in order to allow Mr. Forrest time to plead and defend himself; these little formalities were to be disregarded, notwithstanding the fact that the amendment charged him with fraud and exerting undue influence upon his client, Alice D. Magaw. The proposed new defendant had testified in the case long before the application to make him a party was made. Notwithstanding plaintiff's affidavit to the contrary, no reason is perceived for the delay in making the application. The other averments in the bill were wholly unnecessary; none of them sets up any new or

material fact necessary for the relief for which plaintiff prays. The trouble with plaintiff's case is with his *proof*, not with his *averments*. It does not attempt to set up want of mental capacity in Alice D. Magaw, deceased, at the time she made the deed in controversy. It sets up a little more in detail, the charges of fraud and undue influence contained in the bill. It was therefore wholly unnecessary and the court wisely and properly declined to permit the proposed amendment to be made. The allowance or refusal of an amendment to pleadings is within the discretion of the trial court, and is not the subject of an appeal.

Brainard *vs.* Buck, 16 App. D. C., 595.

Third and Fourth. The third and fourth assignments of error contained in appellant's brief will be discussed together. There is no distinct averment in plaintiff's bill that Alice D. Magaw was not capable of making a valid deed or contract, because of mental alienation or imbecility at the time the deed in controversy was executed; nor is there any attempt made in the evidence, to show that such was her mental condition at that time. Her mental condition became the subject of inquiry in connection with the allegations of fraud and undue influence. The bill does not seek to set aside the deed, because of want of capacity in the grantor to make it, or to understand its nature or effect, but it seeks to set it aside because it was procured either by fraud of the grantees or by undue influence exercised by them, sufficient in force and intensity to dominate and control the will and purpose of the grantor; and that the deed, as made, was not the deed of the grantor, but in effect and legal consequence, the act and deed of the grantees therein. There is nowhere in the record a syllable of evidence to support the averment of fraud. Such an averment does

not prove itself. In discussing the character and quantity of evidence necessary to establish a case of fraud, Chief Justice Alvey said:

> "Suspicious circumstances are not the equivalent of proof; and unless all the facts and circumstances of the case, when taken together, are strong enough to generate a clear, rational conviction of the existence of the fraud charged, that conclusion ought not to be adopted which will destroy a prima facie good title to property, and blacken the characters of the parties concerned."
>
> McDaniel *vs.* Parish, 4th App. D. C., 216.

Much less ought fraud to be presumed in a case like the present, where the parties charged with committing the fraud, are not enriched thereby, but must have acted wholly, if they acted at all, as disinterested instruments, carrying out the benevolent and charitable purposes on behalf of the grantor in said deed. It is difficult to determine whether this charge was wantonly made, or whether plaintiff had some information and belief relative to the fraud averred to have been committed. All the averments in the bill are made upon information and belief; even plaintiff's own name, that of his brother and uncle, his and their places of residence and citizenship, the fact that they are all of lawful age, are not stated as of his own knowledge, but only on information and belief.

In addition to the general principle that a party averring a fraud must prove it, there is the additional reason for the application of this principle, that the law presumes that the acts of individuals are innocent, and their conduct right, rather than the contrary. "Odiosa et inhonesta non sunt in lege praesumenda."

The fraud sought to be established stands alone in the judicial annals of this forum. Neither the parties

charged with the fraud, nor any members of their families or friends, were to be directly or remotely benefited by its commission. It might be denominated a benevolent fraud. A fraud concocted and carried out by the defendants charged with it, for the purpose of elevating and improving the moral condition of the inhabitants of other lands.

Dismissing the charge of fraud as unworthy of serious consideration, we come to the main question in the case, to wit:

Was there undue influence exerted by the defendants, grantees in said deed, in procuring the execution and delivery of the same; or was it the free act and deed of a grantor having a consenting mind?

This question must be answered by an appeal to the evidence in the case, enlightened by the settled doctrine of the law as to what constitutes undue influence. Of these in their inverse order.

First. This court has declared that undue influence for which a deed or will may be annulled, must be such as that *the party making it has no free will, but stands invinculis; it must amount to force or coercion, destroying free agency.*

Towson *vs.* Moore, 11th. App. D. C., 377.

The same case holds that influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practiced; and that the burden of proving undue influence is on the party alleging the same.

In the case of Conley *vs.* Nailor, it was held that in order to set a will or deed aside for undue influence, it must be established that the party making it had no free will, but stood in vinculis.

118 U. S., 127.

In the case of Ralston *vs.* Turpin, the court held that although the execution of the deed may have been induced by feelings of friendship and gratitude, yet if the grantor acted upon his own independent, deliberate judgment, it could not be set aside on the ground of undue influence.

129 U. S., 663.

A will of a person of sound mind and memory, can not be set aside in the Federal courts, on evidence tending to show only a possibility or suspicion of undue influence.

Beyer *vs.* Le Fevre, 186 U. S., 114.

With the principle announced in these cases in mind, let us consider the evidence bearing upon the question of undue influence. To enlighten this point, the most important evidence in the record are the facts and circumstances attending the execution of the codicil to the will and the execution of the deed in controversy. These instruments must be considered together. They were designed to accomplish the same purpose; they both give expression to the same intention, wish, and settled purpose of Alice D. Magaw.

The facts in respect to which there is no controversy are substantially as follows:

Alice D. Magaw at the time of her death was the widow of one Robert D. Magaw, who died in 1887, in the town of Flatlands, now included in the city of Brooklyn, N. Y., where they lived for a period of forty years as man and wife. Shortly after her husband's death she came to Washington and resided here until her death. During the last two or three years of her life she boarded at the La Fetra Hotel, where she died August 10, 1907. Both she and her husband were active members of the Dutch Reformed Church at Flatlands, and she never severed her

connection with that church. Decedent left her surviving two sons, named Van Brunt Magaw and Frederick L. Magaw, and two grandsons, the plaintiff in this case, and his brother Stephen Magaw, only children of John D. Magaw, a deceased son of decedent, as her only only heirs at law and next of kin (Rec., p. 18).

She left a last will and testament, dated September 24, 1895, which was duly attested by four credible witnesses. She added a codicil to said will, under date of February 21, 1907, duly signed by her and attested by three credible witnesses. The will was executed in New York, the codicil in the city of Washington. By the terms of her will she bequeathed the sum of $3,000 to plaintiff, "*In honor of his grandfather's name,*" plaintiff having the same name as his grandfather, decedent's husband. After some pecuniary bequests, not necessary to be here stated, she devised all the rest and residue of her estate to her sons, Van Brunt Magaw and John D. Magaw, in fee, in trust to sell, in their discretion, all of her real estate, and after paying debts and legacies, to pay one-third thereof, each, to Van Brunt Magaw and John D. Magaw, and to hold the other one-third of the proceeds in trust for Frederick L. Magaw, paying to him the income thereof, during his life, and upon his death, the corpus of the fund to go to his legal issue, in equal parts; and if he should die without legal issue, then the said fund was to go in equal parts to said Van Brunt and John D. Magaw. In the event of the death of either of the said devisees before the testator, then the share of the said decedent was to go to his or their next of kin (Rec., pp. 210–211–212).

The codicil ratifies said will in all particulars, save such as were inconsistent therewith. It devised lot 19, in square 759, being house No. 207 B street northeast, to the defendant, Hettie H. Fague, for her life; upon her death, the remainder was to pass under the trust created in the third paragraph of said codicil. This paragraph

devises the property in controversy to Amelia E. Huntley, Lydia H. Tilton, and Hettie H. Fague, trustees for the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of this city, with power to take control of and sell and convey said property.

The proceeds derived therefrom were to be used towards the erection of a memorial to decedent's departed husband, Robert Magaw, and herself, either in China or India, the place of location and character of memorial to be decided by the society. This codicil was witnessed by three credible witnesses; and it, with the will itself, was lodged with the register of wills for probate (Rec., pp. 212 and 213).

The deed in controversy was dated May 28, 1907, and was, at the request of the grantor, left for record in the office of the recorder of deeds for the District of Columbia, by C. M. Forrest, her agent, the same day (Rec., p. 130).

It conveys lots 20 and 21, in square 758, in said city and District, with the improvements thereon, to the defendants, Amelia E. Huntley, Lydia H. Tilton, and Hettie H. Fague, as joint tenants, in trust, first, to permit the grantor to have the rents, issues, and profits thereof during her life; second, upon the further trust, upon the grantor's death, to sell the said real estate, at public or private sale, upon such terms and conditions as the said trustees, or the survivor of them, might deem best calculated to accomplish the purposes of the trust and to convey to the purchaser a good and sufficient title, in fee simple; third, upon the further trust, that after paying the necessary expenses attending the said sale, the proceeds derived therefrom should be paid to the Woman's Foreign Missionary Society of the Metropolitan Memorial Methodist Episcopal Church of the city of Washington, District of Columbia, and the receipt of the treasurer of

said society was to be a sufficient discharge to said trustees for the payment of the money. The money so paid to the said society should be applied by them, in their discretion, in the erection of a building as a memorial to the grantor's departed husband, Robert Magaw, and to the grantor, Alice D. Magaw, to be used either for the purposes of a church, hospital, orphanage, mission home, school, or some other missionary purpose, in the discretion of said society; said building to be erected either in China or India; and the character of said memorial, and the particular place in which it should be located, was to be determined by the said society in its discretion; such determination to be conclusive and binding upon all parties. It was witnessed by E. S. La Fetra and C. M. Forrest, the latter of whom as notary public for the District of Columbia, took the acknowledgment (Rec., pp. 213, 214, 215).

Plaintiff admits the validity of the will, but has filed a caveat to the codicil thereto (Rec., p. 22).

Alice D. Magaw was taken sick in the latter part of August or early in September, 1905, and never fully recovered her health. This sickness affected her power of speech. The defendant, Hettie H. Fague, was her companion and nurse for the last twenty-two months of her life, saving the month of February, 1907, during which month Miss Fague was in the hospital, and Katie A. Lewis, one of plaintiff's witnesses, took her place (Rec., p. 25).

The history of the codicil and deed in suit, as shown by the evidence, is as follows:

The defendant, Hettie H. Fague, testified that in the month of January, 1907, witness, at the request of Mrs. Magaw, cleaned up her desk. Found her will between the flannel of her pad that laid on her desk. Witness told decedent, who directed her to put it in her (witness) trunk, which was in the room, and lock it up. Witness

asked decedent to let her send it to Van Brunt Magaw, or to put it in the hotel safe, but Mrs. Magaw would not permit this to be done (Rec., pp. 105 and 116).

While witness was in the hospital, Mrs. Magaw sent for the keys of witness' trunk. She gave the messenger her keys. Witness never saw the will from the day she put it in her trunk; Mrs. Magaw never mentioned it to her after she got back from the hospital. Saw in the newspaper a statement that she was a trustee for the houses belonging to Mrs. Magaw; it was the first she knew of the deed. She did not know Mrs. Magaw had made a codicil to her will until after her death, but knew of the deed. There was a squib in the paper saying that Mrs. Magaw had deeded two houses to the missionary society for a memorial to her husband and herself; knew nothing of it except what she saw in the paper. Did not want to act as trustee. Mrs. Magaw never talked to witness about her will or the codicil of the will, or the writing of the deed; never heard her say a word about either. Consented to act as trustee because she thought Mrs. Magaw desired it. First knew of the provisions of the codicil a week after Mrs. Magaw's death. Her sister saw it in the paper (Rec., pp. 104–5–6, 117–118).

The defendant, Lydia H. Tilton, testified that she knew nothing of the deed in controversy, except what she heard, until after it was executed; saw Mrs. Magaw from January, 1907, till the time of her death as often as two or three times a month. First learned of the deed about two days before it was made, when she called on Mrs. Magaw to carry her some cake. Mrs. Magaw told witness she wanted her "promise." Witness asked, "Mr. Forrest?" She said, "Yes; I want him quick-quick." She told witness that she was afraid they would contest the will. Witness did not know who her family consisted of. She asked, "Has anybody a right to contest it?" She said, "No; they have had their shares; they have had enough;

this is all mine." Nothing more was said. Did not tell witness about her property; witness never knew anything about it; was there at this time ten or fifteen minutes; was not present at the time the deed was executed; saw an account of it next in the newspapers; did not tell witness to what object she was going to give her property; knew nothing about it; witness did not know whether it was a deed or what it was; heard she had done something for the Woman's Foreign Missionary Society; had not heard what it was; never said anything to witness about the codicil to the will or the will itself; never had any business relations with her (Rec., pp. 119, 120, and 121).

The defendant, Mrs. Amelia E. Huntley, wife of Rev. E. D. Huntley, testified that she knew Alice D. Magaw her lifetime; that she saw her twice only during the last year of her illness; once was in her room; a stranger was present at the time and Miss Lewis. The next time was in the parlor at the La Fetra Hotel, at a regular meeting of some kind; there were some twenty women present. Thinks the first that witness knew of the deed was when it appeared in the papers; did not know there was a codicil; only knew she was going to give something to the Woman's Foreign Missionary Society; did not discuss the matter with witness prior to making either the deed or the codicil (Rec., pp. 202 and 203).

The defendant, Mrs. Sarah D. La Fetra, testified that the first she knew that Mrs. Magaw was going to make a deed was when witness was in her room the night before. Said she intended to make a deed; thought it would be more secure to have a deed, and better than a will; think the suggestion as to a deed came from Miss Lou Wilson, who was in the Wills' office. Does not recollect being in the room when Mrs. Magaw told Mr. Forrest about the deed; did not know her son signed as a witness. Miss Fague sent for Mr. Forrest at Mrs.

Magaw's request. The first witness knew that Mrs. Magaw had any thought of making the codicil to her will was when she sent for witness to come to her room. Mr. Forrest was there. Witness went into the room; they had a will there, and Mrs. Magaw said to witness: "I am going to give that property to missions." Witness said: "Metropolitan Church, Dr. Bristol, pastor?" She said: "No; the Women's Society." That was the first witness knew; Mrs. Magaw never mentioned to witness once that she was going to make a codicil to her will; never knew she was going to do it until that time. Hettie was at the hospital, and she sent for Mr. Forrest and wanted witness to come to her room. Mr. Forrest said to Mrs. Magaw that if she gave the property to missions she had better have some trustees; she said "I will have Hettie; she is interested in missions." Witness said she had better have two other trustees; it will be less care for Hettie. Mrs. Magaw asked witness who she thought would be good; witness suggested the defendants Huntley and Tilton, both of whom are reliable and accustomed to manage property. Witness was present at the execution of the codicil. Mrs. Magaw said she wanted to give two houses to missions, and one to Hettie; she said she wanted to give it to Hettie *"not after her death to the Fagues, but to give it to Hettie for life; not after her death; it would do her no good after her death." Witness said: "Then it would go back to the Magaws." She said, "No; I want it all to go to missions." Witness said: "With the same trustees?" She said, "Yes." Witness said that the Magaws would not be so apt to object to the will if the property went to Hettie for life, and then to them, at her death. Mr. Forrest first wrote the codicil that way, and read it to her, that at Hettie's death it should go to the Magaw family. Witness was in Mrs. Magaw's room when Mr. Forrest read it to her. She said: "No; they do not need it—do not need it."*

She would not sign it; when it was changed and put in the shape she desired, she signed it. After the codicil was executed Mr. Forrest took it away with him (Rec., pp. 142–143, 144–145).

Miss Katie A. Lewis (sometimes referred to as Bertie Lewis), one of complainant's witnesses and hostile to the defendant, Sarah D. La Fetra (Rec., p. 29), testified that she was employed as an attendant for Mrs. Magaw, January 29th, 1907, the time Miss Fague went away; remained until March of the same year. That she signed the codicil made February 21, 1907, as a witness; was called in by Mrs. La Fetra; said something was being done for Hettie. Judge Doan and C. M. Forrest were in the room when she and Mrs. La Fetra came in. Mrs. Magaw was present, sitting at a table. Witness signed in presence of the other witnesses, and saw them sign; the will was not read over to her knowledge. Mrs. Magaw, Mr. Forrest, Judge Doan and witness all signed; after she signed she went out of the room (Rec., p. 30); *heard Mrs. Magaw say time and time again that she wanted to do something for Hettie; never spoke to witness of foreign missions. If she made up her mind to do anything she would do it; if she did not want to do it, she didn't do it. When she made up her mind to do something for Hettie, she wanted it done. Woke witness up one night, and said she wanted it attended to; said she wanted to fix something for Hettie. Mrs. Magaw directed witness where the will was; did not say what she wanted to do with it; it was under a paper in the drawer of her desk. No one in the room when Mrs. Magaw told her to get the will; it was several days before the codicil was executed; never saw it again until she executed the codicil.* When witness *gave it to her, she put it in her desk. She was sane at that time, and in her right mind. Mrs. Magaw was grateful to Miss Fague for what she had done; she did not find the will*

herself; she asked Miss Fague at the hospital where it was (Rec., pp. 30, 31, 32).

C. M. Forrest testified that he was the agent of Alice D. Magaw from December, 1906, to the time of her death, that he was sent for to come and see Mrs. Magaw; *that he called and she informed him she intended to make a deed deeding the two pieces of property the will called for to the Women's Foreign Missionary Society to the defendants Huntley, Tilton and Fague as trustees; witness insisted that she allow the will to stand as it was; not to have any deed; that the will would take the place of a deed; it was not necessary to write a deed; she insisted on having a deed prepared.* Witness prepared the deed, took it to her, and read it over. After reading it over, she said she wanted the other house in the deed, so that the missionary people would get that house also; witness had a deed prepared, took it to her and read it over and talked it over. One or two days after that she executed the deed. I asked Edwin S. La Fetra to be a witness with me to the deed. Witness read the deed over to Mrs. Magaw, and she signed it and acknowledged the same to be her act and deed. Mr. La Fetra and witness signed it as witnesses. *Mrs. Magaw asked witness to have it put on record, which he did.* Was there two or three different times before the deed was finally in shape so that she executed it (Rec., pp. 129–130). *Witness prepared the codicil to the will. Was sent for by Mrs. Magaw to call and see her. She told witness she wanted to make a codicil to her will; asked if he would or could do it. She told witness what she wanted; he made a memorandum; he prepared several codicils; they were not just what she wanted; finally got one she wanted; she said that was right; it was prepared and made part of the will.* Was present at the execution of the codicil; it had been left

with her two or three days; the codicil and the will were together at the time. Judge Doan, Miss Lewis and witness attested the codicil. *The first or second codicil gave the house 207 B street back to the family heirs; Mrs. Magaw insisted that it go to the foreign missionary society, the same as the other two, at the death of Miss Fague; she did not want Miss Fague to know what she was doing; she said Miss Fague was very kind and good to her; she wanted to do something for her after she was gone. Miss Fague was not present at any of these interviews. She was in the hospital. Mrs. Magaw thought it was a good time to make the codicil, so that Miss Fague would not know anything about it. Miss Fague was not present when the deed was executed or at any of the interviews concerning it.* Mrs. Magaw did not want her to know anything about what was going on. She said she was anxious to leave the property to the missionary society; *very much interested in it; her people had enough; very anxious to have a monument to herself and husband.* She said a great deal more than that; that is about what it amounted to. *Spoke of her famiiy; said they had plenty and did not need it; that they had not treated her as well as they might have done.* Witness got the will from either Mrs. La Fetra or Miss Lewis; one of them got it from Mrs. Magaw's desk; Mrs. Magaw told them where it was; it was in an envelope, not sealed, wrapped round with red tape. After the codicil was executed Mrs. Magaw gave it to witness, and asked him to keep it for her. *He urged her to allow the codicil to remain without executing the deed; that the codicil was sufficient; she wanted the deed made out, executed, and put on file at once; she said she was afraid her people would try to break the will; it would be safer to have it deeded; he tried to persuade her otherwise, but she would have her way* (Rec., pp. 131–132).

(Witness read the will, after Mrs. Magaw's death, to Van Brunt Magaw and plaintiff; after the will and codicil had been read, Van Brunt Magaw stated *that it was pretty hard, but it was his mother's will, and no doubt it should be carried out, as he expected to make a will himself, and wanted it carried out as he made it. Plaintiff stated that he was not surprised; that his grandfather and grandmother were always great missionary people; he was not surprised she left her property to missions. Van Brunt's remarks was made after the reading of the codicil.*)

Edwin S. La Fetra testified that Mr. Forrest read the deed to Mrs. Magaw, questioned her in regard to it, to make sure she understood it; he believed thoroughly that she understood it before he signed it as a witness; *he thought that was one of the things he should witness to; whether she knew what she was doing, because she could not speak very clearly.* She wrote her signature in the presence of witness; *did not know anything about the deed prior to being called on to witness it,* except he thinks he heard she was going to give a deed; *did not consult witness about the will or the codicil* (Rec., p. 154).

Robert E. Doan testified that he has been a member of the bar for forty years; witnessed Mrs. Magaw's codicil to her will; he sat close in front of her; witness said, ("I understand you have a paper—a will or codicil you want signed or witnessed?" She said, "Yes." I said, "*Do you understand it?*" She said, "*Yes.*" "*Well,*" *I said,* "*do you want to do it?*" *She said,* "*Yes.*" *I said,* "*Mrs. Magaw, is it your free and voluntary act that you want to do this?*" *She said it was.*) Witness signed in her presence, she in his. Miss Lewis was present, and a gentleman who stood in the rear of Mrs. Magaw; believes it was Mr. Forrest (Rec., pp. 196–197).

Dr. George W. N. Custis testified that he was the attending physician of Alice D. Magaw since somewhere

in June, 1901, to the time of her death. She talked with witness about her business affairs several times. Witness knew the will had been made, from her general talk. At one time she became anxious about some provision for Miss Fague; made it very clear that she wanted to make provision for her, so that she would be provided for during her life, and was anxious only, seemingly, as to how she could do it without disturbing that will, without writing a new will entirely. Can not give the date of this conversation, but it was after her trouble. Did not know certainly that she made the codicil to her will, until he saw it published in the paper. Knew of the deed; whether he knew of it from her, or whether he saw it in the paper, he does not remember. Thinks she spoke to him twice about the codicil; did not know that it had been made actually; knew that she contemplated making it; knew that she was anxious as to how she could secure that property to Miss Fague. He knew from conversation with her that she possessed those three houses (Rec., pp. 171 and 172).

These are the only witnesses who knew anything about the codicil to decedent's last will and testament, and the deed in controversy, or had anything to do with the making or execution of said instruments. None of these witnesses are anywhere contradicted, nor is their evidence discredited, but, on the contrary, sustained in many important collateral particulars. This evidence shows not only that the deed in question is the voluntary act of the grantor, but that it was executed by her in defiance and disregard of the advice of her business agent, because of a settled conviction on her part, that it would more readily accomplish the object she had in view.

The relations of Alice D. Magaw to the defendants, Hettie H. Fague, Lydia H. Tilton, Amelia E. Huntley, and Sarah D. La Fetra were not confidential in the ordinary, and certainly not in the legal sense. They were

members of the same missionary society of the same church. Her relations with Mrs. La Fetra were closer than that of either of the other defendants named, and yet she disregarded heir advice in making a codicil to her will and declined to devise the remainder of the property, out of which she had carved a life estate for the defendant, Hettie H. Fague, to her relatives. She followed her suggestion in having three trustees instead of two, as she had first intended. This, however, was a mere metter of form and not of substance, a detail which she had not thought out and settled upon in her own mind. It in nowise affected or disturbed her main purpose. Membership in the same society creates no relation of confidence and trust; they were all working for a common purpose not personal to either of them and from which no personal advantage could possibly arise. They were all on a basis of absolute equality; there was no subordination of one to the other. The duties of Alice D. Magaw and of said defendants were not towards each other, but towards the society. Undue influence always involves an element of fraud. In the absence of personal advantage accruing to the parties charged with it the burden of proof is upon the party setting it up.

Towson *vs.* Moore, 11th App. D. C., 377.

It is submitted that the charge of undue influence is as unwarranted as that of fraud. The codicil and deed made by Alice D. Magaw, represented her settled purpose and intent, touching the matters to which they relate.

This brings us to the last assignment of error:

Third. Was the mental condition of Alice D. Magaw such, at the time of the execution and acknowledgment of the deed, as to render her incompetent to make it?

To render a deed or contract invalid, in the absence of fraud, for want of mental capacity, the lack of capacity must be absolute, as in case of an idiot or insane person. The case of Jackson *vs.* King, 4 Cow., 207, was an action

of ejectment on the demise of the heirs at law of Moses Caldwell, deceased. The defendants in the case were in possession under a voluntary deed executed by the decedent. The question in the case was as to whether the deed was void for want of mental capacity in the grantor at the time it was executed. It was shown in evidence in the case, that the grantor did not recognize persons coming to his mill; took no part in the settlement of his accounts, although present; indulged in idle stories; talked of turning the water back so that he might enjoy its advantage a second time; was incoherent and unconnected in his statements, and greatly affected by trivial circumstances.

Judge Woolworth, in deciding the case, said:

> "I admit these are proofs of a weak or impaired understanding, but they do not satisfactorily prove anything more."

After discussing the evidence, the court said:

> "On the whole it appears to me that Caldwell had memory and *judgment to a moderate extent, and was not disabled by law, from selling his farm and giving the deed.*"

The court held that if the plaintiffs were entitled to any relief, it would be in a court of equity, and said in that connection:

> "I apprehend, however, that not enough is shown to set aside the deed in that court. *The complainant appears to have been the actor, and to have understood the transaction.*"

This case is also reported in 15 Amer. Decisions, 361, and the learned editor has added a very valuable note to the case, in which he has reviewed the authorities on the question under consideration. He says that it seems to be entirely settled that in order to avoid a contract on the ground of mental unsoundness there must be an

inability to know "*what is the act to which the contract relates, or intelligently to will or to do such act.*" The principal case is Stewart *vs.* Lipscomb, 26 Wendell, 255. The rule laid down in that case is that to produce legal incompetency *there must be a total deprivation of reason.* The rule seems to be, briefly, that in order that one may bind himself by contract he must have sufficient legal capacity to know what he is doing. If less than this, whether by reason of general insanity, or monomania affecting the subject of the contract, he is not bound. By this is not meant, however, that to constitute contracting power there must be sufficient discernment *to enable one to transact his business with prudence and discretion. It is clearly established, as held in the principal case, that mere instability or uncertainty of mind, whether it be congenital, or the result of disease, or decay of the faculties, is not, when unaccompanied by circumstances showing that it was taken advantage of, a sufficient ground for avoiding a contract.*

Of her own volition, and against the earnest protest and advice of her agent, the draftsman of the codicil of her will, Alice D. Magaw, executed the deed in controversy, and had it recorded during her lifetime, on the reasonable assumption that such instrument would be less liable to attack, and if attacked, more difficult to set aside, than the codicil to her will.

In the case of Clearwater *vs.* Kimler, 43 Ill., 272, the court held that *the fact that the deceased grantor, in assenting to the suggestion of a justice of the peace to substitute a deed to a lot of land, to take effect after his death, in place of a covenant to convey, as a means of providing for his children, manifested a degree of prudence that rebutted mental weakness.*

Applying the principles announced in the cases cited, to the facts of the case at bar, the deed is clearly valid.

While the court has nothing to do, in ordinary cases, with the reasonableness or unreasonableness of the provisions of a will or voluntary deed, so they be the free act and deed of a competent testator or grantor, yet when the question of mental capacity is in the balance, the test of reasonableness becomes important, if not controlling. Applying this touchstone to the case at bar what is the result? Van Brunt Magaw says his mother would not live with any of her children after his father's death. That she came to Washington a month or two thereafter; lived here ever since (Rec., pp. 37, 38 and 44). Plaintiff says in his direct examination, that she lived with his father until his death; that she lived in Washington fifteen or seventeen years (Rec., p. 18). Van Brunt Magaw says that plaintiff's father died in 1887 (Rec., p. 37); in his cross-examination, plaintiff says that she lived with his father one or two years; that she never lived with plaintiff at any time; that he never visited her during her illness but twice; once at the instance of his uncle, Van Brunt Magaw. On that visit he staid but one day. They came on for the purpose of persuading Alice D. Magaw to go home with them; she declined to go (Rec., pp. 21 and 22).

All of the property owned by decedent at her death, was the proceeds of her dower interest in her husband's estate, which it seems was all she acquired under his will (Rec., pp. 43–44). Her children and grandchildren were in no way dependent upon her. They were in comfortable circumstances. Van Brunt, although but little past middle life, had retired from business, and complainant is shown to be a man of substance. By the terms of her will plaintiff gets $3,000, and several other bequests are made in the will; and it appears that there is sufficient property, outside of that devised by the codicil, and conveyed by the deed in controversy, to

meet all these bequests. It is shown further that Mrs. McGaw was greatly attached to her husband; that the bequest made to complainant was because of his bearing her husband's name, and not because of any special affection for him. She was a religious woman; was interested in missionary work, and had been for years prior to the making of the codicil and deed, giving liberal donations to the cause (Rec., pp. 25, 147). Hettie Fague had been with her for the last two years of her life; had given to her the attention, care and affection, which no member of her family gave her, and on account of which Miss Fague had won her affection (Rec., pp. 25, 47, 71, 73, 96, 172, 201–202). Miss Fague was a poor girl, obliged to work for her living; what more natural than that decedent should give to her some part of her property after her death. The codicil could not have gone into effect until decedent's death, and she expressly reserved a life interest to herself in the property conveyed by the deed. The proceeds to be derived from the residue of said real estate, she devised and willed to be used in establishing a memorial, linking her name with that of her husband, in a work in which, in her lifetime, while in the full possession of her powers, she was much interested. The transaction was reasonable in itself, and the means taken to effectuate it, were the best that could have been devised. It was a sensible act, reasonably performed. How could such an act proceed from an unsound mind? The act and the manner of performing it, are pregnant proofs of the mental soundness of Alice D. Magaw, at the time she executed the deed in controversy.

There are three other principal items of evidence bearing upon decedent's mental condition at the time of the execution of the codicil to her will and of the deed in trust in controversy which remain to be considered:

First. The business transacted by decedent during the

two years prior to her death outside of the execution of the codicil and deed in trust.

Second. The medical evidence.

Third. Non-expert opinion evidence.

Of these in their order.

First. Decedent had a bank account at the American Security and Trust Company during said period. She settled all her monthly and other bills by check. All of these checks, sixty-seven in number, are in evidence. The first bears date August 16, 1905, and the last July 20, 1907 (Rec., pp. 208, 209, 210, 225).

The last check is dated eleven days prior to her death. Three of these checks are signed by mark, one dated September 11, 1905, and the other two October 18, 1905. They are all witnessed by V. B. Magaw (Rec., p. 40). All of the other checks are signed by decedent in the usual way.

The only real estate owned by decedent consisted of the three houses mentioned in the codicil to her will. She superintended or directed the repairs made upon these houses, and received monthly statements from her agent of the rents collected and moneys disbursed on account thereof. She changed her agent about eight months prior to her death (Rec., pp. 106, 132, 133).

The bills paid by her were all of them itemized and examined by her before payment. She paid the taxes on her property (Rec., pp. 147, 148).

On the 30th day of March, 1907, the month following the execution of the codicil to her will, Alice D. Magaw executed and acknowledged a deed of release of a mortgage made by one Charles E. Schiffman, the mortgagor, securing an indebtedness of $23,629.24. She was entitled to the interest, for her life, on $7,800 of the money secured by this mortgage. The note representing this fund was placed in the hands of the defendant, Van Brunt

Magaw, for the security of his mother, and the protection of her interest therein. The corpus of the fund, upon the death of the said Alice D. Magaw, belonged to plaintiff and his brother. In April of the year 1907, on plaintiff's demand, the indebtedness was paid and the interest of the decedent therein was commuted in accordance with the tables of mortality. The sum of $1,200 was reserved by the said Van Brunt Magaw, as representing the present value of his mother's interest in said fund. The deed of release was acknowledged before John E. Mitchell, a commissioner of deeds for the State of New York, and the same was duly recorded (Rec., pp. 217, 218).

Van Brunt Magaw, on May 13, 1907, answered a letter from his mother, and sent her a check for $1,200, and advised her to invest it in a mortgage in Washington; he also advised her that the sum of $1,200 was the proper amount that she ought to receive in commutation of her life interest in the fund (Rec., p. 226).

This money was in final settlement of decedent's interest in her husband's estate (Rec., p. 106). Decedent added $300, which she had on deposit in the American Security and Trust Company, to this fund, and made a loan of $1,500, secured on real estate in this city. The letters relating to the transaction, which were written to plaintiff's attorney, Francis S. McDivitt, Esq., and her son, were dictated by decedent. She would read the letters over three or four times before she would allow them to be sent (Rec., p. 107). She gave a check, dated June 7, 1907, to the order of Martha A. Bremmerman, the party who borrowed the money from her (Rec., p. 230).

Decedent attended to the selection and making of such clothes as she needed in the winter of 1905, and paid for the same by her check (Rec., pp. 147, 148).

She attended a missionary meeting of ladies in the

parlor of La Fetra Hotel, in the month of February, 1907, and conversed with the ladies present (Rec., pp. 122, 146).

She had little social times in her room with ladies (Rec., 146). Decedent was accustomed to have the Bible and a little book of common prayer read to her daily, in the morning. She had the papers read to her daily, and liked to have most any part of them read to her; liked to know what was going on; this continued up to within a week of her death (Rec., p. 107).

John E. Mitchell testified that he saw decedent twice in the year 1907, before he took the acknowledgment of the release above referred to. That he visited her for the purpose of taking her acknowledgment to releases of her dower interest in property situated in the State of New York (Rec., pp. 157, 158).

It is testified that the last week or two weeks before her death, decedent's pastor administered the communion service to her in own room; that he explained subjects, and she was delighted; talked about it afterwards, and said she had never heard the communion service expressed as it had been; after the service she bade her pastor "good-bye until we meet" (Rec., p. 108.)

This is substantially all of the evidence in the record, touching the business transactions of Alice D. Magaw, and the acts done by her, from August, 1905, to the period of her death.

Second. The medical evidence consists of the testimony of Dr. John B. Zabriskie, Dr. Oscar H. Coumbe, Dr. Wilfred M. Barton, and Dr. G. W. N. Custis. The first three were produced by the plaintiff, the last by the defendants.

Dr. John B. Zabriskie called to see decedent at the request of her son, Van Brunt Magaw, in May, 1906, while on a visit to this city. He had known her from boyhood.

Was with her about half an hour. She seemed to impress witness as suffering from aphasia, which is a defect of speech due to some cerebral brain lesion. Felt her pulse and examined her general condition. Her pulse seemed to be pretty hard, as if she was having a good deal of arterial change going on. Aphasia is the result of arterial degeneration; it is a progressive disease; it is incurable. This arterial hardening caused a thrombus in the blood vessel, which would cause a degeneration or softening of the brain. Under objection, stated that he did not think she was capable of attending to business affairs.

On his cross-examination he stated that aphasia is caused by a disease of the brain; does not know whether it usually involves the mental faculties. Aphasia is due to some disease of the speech centers (Rec., pp. 48–56).

Dr. Oscar H. Coumbe examined decedent in December, 1905, at the request of Mrs. La Fetra. Was in attendance on Mrs. Love and Miss Belle Love at the La Fetra Hotel; found Mrs. Magaw in a condition of what might be termed senile degeneration of the brain and softening of the brain. Her blood vessels were atheromatous; heart and pulse slow; condition very childlike. There was a condition of paralysis along one side. *Was absolutely certain she could not attend to business; she didn't attend to any business.*

On cross-examination he stated that he did not examine Mrs. Magaw in the capacity of a physician, as he would have done if regularly called to see her. Did not prescribe for her in any way. Did not consult with her attending physician. One portion of her brain seemed to be better than the other. It seemed to be a blood clot produced by a rupture of a blood vessel in the brain; due to a degenerated condition of blood vessel to the brain or in the brain; this blood clot producing an irritation in the part of the brain governing

motion—that is, speech and sight, more or less. Very seldom does a blood clot caused by a rupture of a blood vessel in the brain become absorbed to any marked degree. *Now if there is an embolism, produced by a blood clot coming off from the heart, it might produce a similar condition, which might become partially absorbed, and the symptoms would become less and the paralysis less. Now that is if a blood clot comes off from the heart and goes up there and lodges.*

> "I said a ruptured blood vessel in the brain was what afflicted Mrs. Magaw. I am sure the blood vessel of the brain itself was ruptured, because embolism occurs in younger people, and these blood clots in the brain occur in people of old age, and where there is this atheromatous condition of the blood. I think it was a ruptured blood vessel because of her age and deteriorating blood vessels, and atheromatous condition of the blood vessels, which accompany and go along with a person of her age. It is not her age that made it, but it is a condition of the blood vessel."

Does not think that in her condition it would be absorbed so that she would get better. It was a blood clot on the brain. It involves the mental faculties necessarily, but not always in the same degree. Aphasia is permanent when connected with apoplexy resulting from a rupture of a blood vessel in the brain. Never knew a party afflicted with it to recover entirely. If persons have aphasia as a result of a blood clot on the brain, they certainly are mentally disqualified from attending to their business affairs and making a deed or will (Rec., pp. 86, 87, 88, 89, 90).

Dr. Wilfred M. Barton never saw Alice D. Magaw. He examined plaintiff's evidence, and a hypothetical question was submitted to him, based upon such evidence; he testified that, basing his opinion upon the facts

contained in the hypothetical question, he would say the woman was suffering from softening of the brain. The term thrombosis simply means an accumulation of matter within the lining of a blood vessel. Under objection, stated that dementia is a very common sequel of cerebral softening. Thinks that a woman in that condition would be totally incapacitated to manage any business affairs. On cross-examination, stated that his opinion was based entirely upon the truth of the facts contained in the question; that the question was submitted to him before he went on the stand, and that he assisted in making it out and was paid for his evidence (Rec., pp. 101, 102, 103, and 104).

Dr. G. W. N. Custis testified that he attended decedent, since June, 1901, to the time of her death. That he called on her only three times in the month of May, 1907—the 3d, the 24th, and the 29th—and then not until June 14th; that he has lost his memorandum of his calls in February, 1907, but they were infrequent; decedent, two or three times prior to her illness in 1905, and reaching probably a year back, was troubled with an irritable heart. That period which developed the aphasic condition was preceded by about three days, I think, of that irritable heart condition, and during one night she developed the aphasia. The aphasic condition entirely relieved the heart condition. The sudden coming of the aphasic condition was somewhat of a shock to her system and affected her quickness of comprehension, but she became afterwards much better, nearly all her symptoms disappearing, except her slight aphasic condition. Aphasia is an inability to express thought in her condition by words. There are several varieties of it. Hers was amnesic aphasia, the inability to express ideas intelligently on account of loss of memory of words. *The cause of it was clearly an embolus proceeding from the heart and lodging in a vessel of the brain that supplied*

the speech area, as made clear by the fact that the production of the aphasia relieved the irritable condition of the heart. I can only judge that there was some clot formed there, and that the breaking away of that clot or a portion of it passing to the brain produced the aphasia. I did fill out the death certificate as required by the statute here. I had forgotton what I said; thrombosis is not the proper word; I should have said embolism. *The difference between the two is that the clotting body in the case of thrombosis is formed on the site of the lesion, and in embolism is carried to the site of the lesion over the other portions of the system* (Rec., p. 170).

Her condition improved (from the time of her first attack) to the extent that physically she was in very good condition and her mentality was good; it was never bad, excepting two or three days, the few days that were required to get over the shock, after which mentality was good. She understood perfectly, and it was very evident that she knew her own mind pretty well, but she could not express her ideas fully; she could not carry on an abstract conversation; she was very much worried that she could not talk to visitors, excepting in regard to things that were immediately about her. In May of the last year of her life her condition was good, physically and mentally. Witness has not his record for February, 1907, but as he remembers it, the condition was good, as he remembers his memorandum; her power of expressing her thoughts during these months, was good as compared with other months. She talked with witness with respect to her business affairs; spoke three or four times about her difficulty in collecting rents; this was after her sickness; was troubled about the conduct of her agent at that time; never talked with witness about anything else, apart from her will; she was anxious about some provision for Miss Fague, so that she would be provided for during her life. This conversation was after her trouble. Her

condition was excellent at the date of the codicil; did not know certainly that she had made a codicil to her will, until she saw it published in the paper. Knew of the deed, either from her, or from the paper; *her condition at the time the deed was made was excellent mentally and physically* (*Rec., p. 171*).

She understood what was said to her, and she knew what she wanted; was very decided in her opinions at times, losing words, forgetting words; that was her condition in May, 1907. Her mind was clear; her sight was defective, due to the formation of a cataract; there was only one eye where it was very pronounced; thinks the other was slightly affected. That was a gradual formation, and for some time it troubled her to read; in its development witness supposes she could hardly read at all. Her sight at a distance was such that she could distinguish objects and get around the room; her vision was better at long range than at short; she suffered an operation for cataract. Miss Fague was an attendant who was assiduous, efficient and sympathetic. She was all to Mrs. Magaw that anybody could be in that position, Witness thinks that decedent spoke to him twice about the codicil; before the codicil was made; spoke to him in respect to the missionary work being done by the church; she was very much interested in missionary work; very much devoted to her church; was bright intellectually and very decided in her opinions (Rec., p. 172).

The hypothetical question submitted to Dr. Wilfred M. Barton was shown to witness, and after reading the same, he stated that the facts assumed in the question did not correctly represent the mental and physical condition of Mrs. Magaw; things were assumed therein that did not exist, and a general condition given which does not suit her case (Rec., p. 173).

The cross-examination of witness by plaintiff's coun-

sel, which was at great length, and with the evident purpose of breaking the witness, only adds to the effect, candor, intelligence and evident fairness of the witness' statements (Rec., pp. 173 to 196). The evidence of this witness, by virtue of his special knowledge of the case, is entitled to more weight than that of any other witness, lay or professional. His diagnosis of the case is directly opposed to that of Dr. Zabriskie and Dr. Coumbe, and leads necessarily to a different conclusion. That Dr. Custis' diagnosis was the true one, is demonstrated by the result. *The irritation of the heart ceased at once, on the appearance of trouble in the brain.* Dr. Coumbe testified that Mrs. Magaw was suffering from rupture of a blood vessel in the brain, due to its degenerate condition; on cross-examination, he says: "*Now if there is an embolism, it might produce a similar condition; and the symptoms would become less, and the paralysis less.*" This is exactly what took place, as shown not only by the evidence of Dr. Custis, but by the evidence of all the lay witnesses best qualified to speak of the history and progress of the disease. The theory of plaintiff's case, based on the evidence of his medical witnesses, is that decedent was afflicted with hardening of the arteries, and softening of the brain; a progressive disease, which would not only get no better, but as time passed on, must get worse.

The examination made by each of plaintiff's physicians was superficial in the extreme and proceeded from the start upon the assumption that the immediate cause of decedent's last illness was a hardening of the arterial system, superinduced by old age. Their testimony is not only colored, but controlled by this false theory and prognosis.

The evidence of Dr. Barton, who testified as an expert alienist, is hardly worth considering. The question which he answered was framed by himself and plaintiff's

counsel, and was on its face a perversion of the facts established by plaintiff's own testimony. That it did not represent the true condition of Alice D. Magaw, is abundantly established by the evidence of lay witnesses, leaving outside of the case the evidence of Dr. Custis. It is respectfully submitted that the medical evidence produced by plaintiff is entitled to no weight or consideration in the adjudication of the case.

This brings us to the last question in the case:

Third. Sixteen lay witnesses testified on behalf of plaintiff; twelve for the defendants. Plaintiff makes one of the sixteen. His evidence is without probative force. He made and swore to charges of fraud and undue influence against some of the defendants to the bill, of which there is not a syllable of proof in the record. In the month following the execution of the codicil to the will, he obtained a release from his grandmother, of a mortgage in which she, with himself and his brother, were the mortgagees. This release was duly acknowledged and recorded in the land records of the State of New York, and constitutes one of the present owner's muniments of title. The instrument is invalid, if Alice D. Magaw was non compos at the time it was executed. By reason of the release, the mortgagor paid to the plaintiff, and he received payment of a large sum of money. He is now here insisting that his grandmother was, *at that time, wholly disqualified from making a valid deed or contract.* If not technically estopped from making such a contention in a court of equity, he is at least morally estopped. While plaintiff has not averred in his bill, he has attempted to prove the mental incapacity of his grandmother, at the time she made the codicil to her will, and the deed in controversy. In his own testimony, he carefully avoids saying that she was not capable of making a valid deed or will, at the date in question; but says *he thinks she was incapable of caring for her busi-*

ness; that she was in charge of a nurse all the time (Rec., p. 21).

In his cross-examination he spoke of his grandmother as "the woman," a term hardly befitting that degree of respect and affection which he claimed to entertain towards decedent (Rec., p. 20).

When Mr. Forrest read the codicil to him and his uncle, he said he was not surprised at the contents; made no pretence that Mrs. Magaw was not capable of making a valid deed or will.

The evidence of Van Brunt Magaw shows that he saw his mother several times during the two years of her sickness, but he was unable to get into sympathetic touch with her or her condition. He speaks of being alone with her one evening; she became very irritable; tried to talk and could not make him understand what she was trying to say; became very irritable (Rec., pp. 41 and 42).

On cross-examinaton he stated that he did not try to talk with her; wanted her to keep quiet, and supposes that might have irritated her, when she found he was not inclined to talk; she kept trying to talk, and he kept trying to dissuade her; wouldn't answer; supposes that irritated her. When witness came to see her she almost always insisted on his going out to see the city; did this every time he went down there; if he sat down there, she would think he ought to be out, instead of staying with her; indicated that by her gestures. He sent her $1,200 in the month the deed before the court was made; advised her to invest it in Washington; says on that occasion she took his advice. His check was made payable to her order and bears her endorsement (Rec., pp. 43 to 47).

When the codicil and deed were read to him after his mother's death he said it was hard, but it was his mother's will and he wanted it carried out, just as he expected his own will to be carried out (*Rec., p. 134*).

He never hinted that he thought her incapable of disposing of her property. He tried to avoid the effect of this voluntary statement by saying in his evidence that he did not intend this remark to apply to the codicil; that he never approved of that; forgetting that the remark itself would be utterly absurd and irrelevant, except as it applied to the codicil. The will was not "hard," as it left the property in controversy to him and his brothers in equal parts. His statement that the codicil was hard, but that he wanted it carried out, is consistent with his subsequent conduct. He declined to join in the caveat to set aside the will or in the attempt to defeat the deed. It is straighter than his evidence. His answers to the interrogatories propounded to him in his deposition taken in New York are disingenuous and do him little credit.

Miss Katie Lewis was one of the witnesses to the codicil, and testified that Mrs. Magaw was sane at the time she made it. She was, during the month of its execution, testatrix's companion and nurse; was with her night and day, during the month of February, 1907. From March to August, of that year, she was employed in the La Fetra Hotel; during that time she constantly saw and visited decedent. Her opportunities for observing and knowing the condition of decedent, were better than those of any other witness produced by the plaintiff. She had been discharged by the defendant, Sarah D. La Fetra, and on that account was hostile to her. Before her evidence was given she had been entertained by Van Brunt Magaw and family. She was naturally flattered by this attention. These circumstances make her statements touching the mental condition of the grantor in the deed all the more valuable (Rec., pp. 24 to 32).

The evidence of Miss Belle Love is strongly corroborative of defendants' contentions; she lived on the same floor of La Fetra Hotel, with Mrs. Magaw, before her

sickness and after, until she left the hotel in May, 1907 (Rec., pp. 82, 83). On her cross-examination witness testified *that she could understand what decedent wished to say or tried to express, because she had been with her so much. She was acquainted with her habits and tastes* (Rec., p. 84). She stated that decedent was in the habit of receiving company in her room, up to the time witness left the hotel, and seemed to enjoy the visits of her friends. In her way, engaged in conversation with them. This continued until the time witness left the hotel. She went downstairs to her meals, ate at the common table, the same as anybody else, up to a month of the time witness left the hotel. She was a woman of considerable intelligence, a great reader, conversant with and interested in public affairs. She did not discuss her private affairs with people generally; never said anything to witness about her will or making a deed. Witness was asked to witness the codicil; thought it was necessary for a witness to know the contents of the will; thought that Mrs. Magaw was too feeble to make a codicil; thought it would lead to litigation; *did not know that she did desire to make it herself; never heard her express herself to that effect; never talked to her about it; would not have thought it wrong if she had desired to do so.* Dr. Custis told witness that he was treating Mrs. Magaw for a clot on the brain; *witness took it for granted that a person in that condition was not capable of adding a codicil to her will; witness' attitude in respect to the will was based on this statement of Dr. Custis; thought the provision for Miss Fague would provoke a contest* (Rec., pp. 84, 85).

Mrs. Anna Love (mother of the preceding witness) testified that Mrs. Magaw was pleased to have company; that her face would brighten up. In her attempts at speech sometimes she would appear to be conscious that she had made a mistake, not speaking the right word,

and would manifest impatience. Sometimes it would make her irritable and sometimes she would laugh. Witness declined to be a witness to the will, because she thought Mrs. Magaw too feeble to be worried; was afraid it might lead to a lawsuit; *that was the only reason she declined* (Rec., p. 80).

It will be remembered that Mrs. Love and her daughter were present at the time Dr. Oscar H. Coumbe examined Mrs. Magaw, and that he was their physician and in attendance upon them during Mrs. Magaw's illness (pp. 86–88–88). It is probable that their views of Mrs. Magaw's mental condition were colored by his impressions of her case.

Mr. Frank M. Smith and his wife, Sadie L. Smith, testified to a single visit about an hour in length, made to Mrs. Magaw in March, of the last year of her life. This was the only time either of them saw her during the last two years of her life. Mr. Smith made a note of the event in his diary (Rec., p. 34).

He testified that Mrs. Magaw, in her efforts to converse, would say, with impatience, "why can't I say it? I can't say it." Under objections, stated that decedent had no capacity for attending to any affairs (Rec., p. 33).

Mrs. Smith is the daughter of Van Brunt Magaw; stated her grandmother looked well in the face.

> "By her actions, and everything that I saw, she looked natural as I knew her, but she did not act naturally as I had known her; *the difference was that she couldn't speak to us*" (Rec., p. 36).

John C. Giles, Jr., testified that he called at decedent's room, in April, 1907, for the purpose of seeing Van Brunt Magaw's daughters. Was there fifteen minutes; possibly more. Had never seen Mrs. Magaw before (Rec., pp. 57 and 58).

Neither of the last two witnesses expressed any opinion as to Mrs. Magaw's mental condition.

Rev. John S. Gardner, pastor of the Flatlands' Dutch Reformed Church, visited decedent in January, 1907. Testified that she seemed enfeebled in body, and to a certain extent in mind. Was there only a little while. They talked together; she didn't say very much. "*The only sentences that I can remember that she uttered was simply a sentence. The church had built a new parsonage; she asked about that parsonage; if we occupied it.*" On cross-examination witness said that the *remark about the parsonage was a matter she introduced herself; had not been the subject of conversation previously.* As a matter of fact there was a new parsonage that had just been finished. Don't know whether she understood or appreciated his conversation. Witness expressed no opinion as to her capacity to make a valid deed or contract (Rec., pp. 58–59, 60).

Mrs. Matilda W. Magaw, wife of the defendant, Van Brunt Magaw, testified that she saw decedent a short time after she was taken sick; tried to talk with her, and found it very hard to understand her. She tried to talk. Was there at that time one or two nights. Next visit was in October (Rec., p. 61); did'nt call her by name; didn't think she knew her. She tried to talk all the time; saw her again in December, 1905. Had very little conversation with her at this time. The next visit was in April, 1906; at this visit she wanted to know something about home; talked with witness about an hour; *she became very much excited; very much provoked with witness.* Did not utter a sentence that witness could understand without help. Was there in November of 1906, and July, 1907, and thinks also in April of that year (Rec., p. 62). Did not notice any change in the talk of Mrs. Magaw from the first time she went there; *had to help her out every time.* Talked with her about the sale of the homestead (evidently the property for which the release of the mortgage was given, page 217 of the

record). *Sat with her two hours that night; made witness very nervous* (Rec., p. 63). *At one of witness' visits decedent declined to pay witness' board at the hotel; said she could pay it herself.* Witness said she heard Mrs. Magaw use profane and indecent language during her sickness. Under objection, she testified that she was positive that decedent could not attend to any business; coud not talk; could not ask a question; eyesight poor (Rec., p. 64).

On cross-examination she stated that there was some one who slept on a couch, in the same room with decedent. Witness conversed with her mother-in-law first time she visited her after her sickness; she could not finish her sentence; witness would help her out; her condition in regard to speech did not grow better or worse; never saw any change. The old homestead was decedent's husband's place; it went to her youngest son, under her husband's will, subject to decedent's dower. The time Mrs. Magaw declined to pay witness' board was the last time she saw her alive (in July, 1907, about a month before decedent's death); was there at that time, three nights. At these interviews Mrs. Magaw became very impatient when she could not express what she desired to say; sort of irritable (Rec., p. 66); don't know whether she was conscious that she was not making herself understood; *never heard her use profanity;* used indecent language twice; can't recall the times (Rec., p. 66). *She always steadily resisted going home.* Found Exhibit No. 2 among the papers belonging to decedent, given to witness after her death. Nothing to indicate when it was written; witness don't know when it was written (Rec., p. 67).

Mabel W. Magaw, daughter of Van Brunt Magaw, testified that she visited decedent in April, 1906; was there two weeks. If they told decedent they were going out, she would be awfully afraid they wouldn't get there the

right way, and would try to tell them what car to take. Was often unable to guess what she meant. *When they first went there, she seemed to think it was her duty to entertain them; tried to tell them stories.* Visited her again in November, 1906; was there three nights that time; tried to get her grandmother to have her picture taken; decedent walked to the studio; *said it was silly to have her picture taken;* told them about being provoked with her first nurse; after returning from a walk, told her, "Now, *I* am a lady; you can go." Those were her words. Would have to ask her grandmother over and over again, what she meant; *witness would imagine she knew what she meant.* Was there two weeks in April, 1907; Mrs. Magaw was not able then to talk any better; some days she talked better than others, probably on account of her physical condition. Has heard her use profane or indecent language; *before her attack she did not commonly use such words* (Rec., p. 69).

Every time witness visited her tried to coax her to come home; Mrs. Magaw would say wait till she could talk better; *she would say, "He says it will come." Witness thought she meant the doctor thought her speech would come back. When witness was talking to her thought she sometimes understood what she was saying.* Thinks Miss Fague told her more than once that her grandmother did not understand what she (Miss Fague) read to her. She was much feebler in April, 1907, than before. Under objection witness stated that she *did not see how decedent could attend to business.* She could not *make herself understood* (Rec., p. 71).

On cross-examination stated that her twenty-first birthday occurred during her visit to Mrs. Magaw in November, 1906; that was the time Mrs. Magaw went out with witness and had her picture taken; after the picture was taken *decedent went with them on a trip to Great Falls on the trolley cars; it took about an hour*

and a quarter to go there; had lunch and got back about three in the afternoon. Decedent went out driving with witness several times; not positive whether she went out in April, 1907; she might have. *Used indecent expressions once or twice in conversation with witness;* have heard her in conversation with Hettie Fague and others. *Thought from the way she acted that she might understand what witness said to her when she helped her out* (Rec., p. 72).

Miss Fague did not read the newspapers to decedent latterly; said that she did not understand anything she read, but she read the Bible and religious books to her. Every time witness went there she would try to coax her grandmother to go home with her; sometimes her grandmother would say: "Well, I will see—I will see;" but she never came; said she would like to come (Rec., p. 73).

Charles E. Banes testified that he was the agent for Mrs. Magaw's property here for twelve or fifteen years, up to probably within a year of her death; saw her twice within a few months of her death; second time just called to see how she was; staid probably five minutes; couldn't talk very well; couldn't connect her words. Didn't see Mrs. Magaw more than two or three times the last year of her life; she went to Brooklyn in the summer. No occasion to see her about anything, except to send her a check every month. Under objection stated that he did not think her capable of attending to business the last time he saw her (Rec., pp. 75–76).

On cross-examination stated that he thinks he went to see her three or four times during the two years prior to her death. The last time he saw her was before he was discharged as agent; never saw her afterwards; can't tell when it was before that that he saw her; last time he saw her he thinks was three or four months before she died; saw her in the parlor of La Fetra Hotel; two

or three ladies present; sent up for her and she came down; don't remember the subject of the conversation; staid about five minutes; *this was before he stopped collecting rents for her. Last time he saw her she was not very well.* Simply sent her a check every month until he was discharged as agent. Mrs. Magaw was a woman of strong character when in good health, a woman of intelligence, capable of managing affairs and knowing what she wanted to do, disposed to do it and have her own way when she had made up her mind (Rec., p. 76).

Mrs. Mary H. Williams testified that she knew Mrs. Magaw for about twenty years previous to her death; saw her not more than once or twice from August, 1905, to the time of her death, and that was in 1905 and 1906. "The first time I saw her she was quite well, I thought, after a spell of sickness." Talked with her; not able to understand what she wanted to say (Rec., p. 91). Saw her in March, 1907; tried to talk with her; only there about five minutes the last time she saw her. Under objection, she stated that she did not know whether she was able to attend to her business affairs or not; *didn't think she could attend to very much* (Rec., p. 92).

On cross-examination, stated that she appeared to enjoy her visit; responded to witness' conversation as much as she could, and asked her to come again; appeared to be much gratified; appeared to be conscious of miscalling words in conversation; would often say: "*I can't say what I would like.*" *Thinks she knew what she wanted to say, but was not able to say it* (Rec., p. 93).

Mrs. Bessie E. Hurt testified that she went to La Fetra Hotel about March 25, 1907, and remained about ten days; met decedent; saw her occasionally when witness went over to her room; sometimes addressed her; she would answer "Yes" or "No." Never heard her say anything more than that; characterized her condition as feebleness and weakness. Don't think she was strong enough to attend to business (Rec., pp. 94 and 95).

On cross-examination, stated that she was in Mrs. Magaw's room several times, and went driving with her once, during the time witness stayed at the hotel; saw her several times, twenty minutes at a time, during the ten days she was there. Sometimes her countenance would brighten up when we were talking in the room; Miss Fague and witness would talk, and her countenance would brighten up. The drive lasted about an hour; went through the town. *She could not talk to you, and that is why witness thought she was not able to attend to business* (Rec., p. 96).

Caroline F. Wolfley testified that she knew decedent all her life; saw her about once a month, at least, during the last two years of her life; saw her immediately after her first attack; was then in miserable condition; was attempting to eat; ate in the most animal-like fashion, putting the food in her mouth with her fingers; *but she improved from that and went down to the cafe to eat;* had to have all her food prepared and handed to her (Rec., p. 98).

Witness talked to her and decedent tried to talk to witness; don't recall any of the conversation; she tried to say something; tried to talk, but witness never knew what she was talking about; don't recollect how often she called on her after she had an attendant; no occasion for her going so often after that; don't think she appeared to know she had made a mistake in the word she wanted to use; if you questioned her she would repeat the same words or other words and try to explain, but failed to convey the idea; if we didn't know what she was trying to say we would suggest various things; if you didn't call the right article she would not indicate; *if she wanted a trunk and you gave her a shawl she would not take it; thinks she continued to go to the dining-room to take her food up to within a couple of months of her death; went to the public dining-room*

and sat at public table with other people; she usually had some one in attendance; intervals when she did not (Rec., p. 101).

Neither Frank M. Smith nor Charles E. Banes saw enough of Alice D. Magaw during her last illness to qualify them to express an opinion of her condition at the time the deed was made. Shaffer *vs.* U. S., 24th App., D.C., 436–437. Both were willing witnesses and the evidence of the last refutes itself. He was decedent's agent for the collection of her rents, up to December, 1906, eight months before she died. He accounted to her monthly up to that period, and sent his check to her in settlement of her account, and treated her in all respects as though she was competent to do business. Whether he saw her at all during her illness, except at the time of his discharge, is left uncertain by his evidence.

The evidence of Matilda W. Magaw contradicts in some important particulars the well established facts relating to decedent's condition. She states that there was no change in the ability of Mrs. Magaw to talk, from her first illness, till the last time she saw her. The well established fact is that her power to express herself greatly improved, and was better during the last year of her illness than it was at first. She also testifies that she heard decedent use profane and indecent language during her sickness. On her cross-examination she says she never heard her use profanity, but did hear her use indecent language twice; she did not state what the indecent language used by decedent was. None of the other witnesses, except Mabel W. Magaw, testify to either profane or indecent language. It is incredible that she should have used such language only in the presence of those two witnesses, when she was with them much less than with many of the witnesses who have testified in the case.

Miss Mabel W. Magaw testified that she heard her use indecent expressions in conversation with Miss Fague and others. Miss Fague, emphatically denies, in her evidence, that she ever heard her use profane or indecent language (Rec., pp. 115–116).

The evidence of Mrs. Van Brunt Magaw shows that the relations between her mother-in-law and herself were not congenial; that they were not in sympathetic touch with each other. Decedent got very provoked with witness at her visit in April, 1906. The last time witness visited decedent was in July, 1907; she testifies that she got very nervous over a conversation she had while alone with her mother-in-law, relating to the sale of the old homestead, and she was glad when the others returned (Rec., p. 63).

It was at this visit that decedent declined to pay witness' expenses at the hotel, showing clearly that the memory of the events of the night before were fresh in her mind and constituted the undoubted reason for her conduct on this occasion. The opinion of this witness as to the mental condition of decedent was neither asked nor given. She stated, under objection, that decedent could not attend to business, and the clear inference from what the witness says is that this was because of her *physical* condition.

Much of the evidence of her daughter, Mabel W. Magaw, corroborates the evidence of defendants. Her grandmother's anxiety that her granddaughter should have a pleasant time while visiting her; that she should go by the best routes when she visited different parts of the city; the incident with the nurse and the taking of the grandmother's picture are all the natural expressions of a normal mind and such as might be expected between parties occupying the relations of grandmother and granddaughter. Her belief that her speech would come back and her declining to go home with witness until it

did return was, under the circumstances, the act of a sensible mind.

The incident of the photograph took place in November, 1906, more than a year after decedent's first illness. The fact that she was able, on that day, to bear a journey on the electric cars to Great Falls and return, accupying more than three hours, shows that her physical condition must have greatly improved since her first illness in the fall of 1905.

It is to be noted that neither of the defendants, Frederick or Stephen Magaw, have testified in the case, one of whom has twice as much and the other an equal interest with the plaintiff in the result of this litigation.

The opinion evidence obtained from these witnesses was given in response to interrogatories asking witnesses, in some instances, as to decedent's mental capacity to attend to business, and in others as to her capacity to attend to business (Rec., pp. 64, 71, 76, 95). In either form in which the question was put the witness might well state that decedent was incapable of attending to business and still throw no light upon her mental capacity to make a deed or will. The question is not as to her capacity to attend to business generally, but whether she had intelligence enough to understand the quality and nature of the act which she performed on May 28, 1907.

Critchfield *vs.* Easterday, 26 App. D. C., 94.

Allowing to this evidence all the weight to which it is entitled, it still, in view of the uncontroverted facts of the case, comes far short of establishing want of mental capacity in the grantor in the deed in suit at the time it was executed. This is putting to one side all of the evidence of the same nature offered by the defendants in the case. It is not deemed necessary to particularize this evidence. Twelve witnesses have testified that Alice D.

Magaw was capable of making a valid deed or will in May, 1907, and have stated many important facts, bearing upon the mental condition of decedent, in support of their opinions. Miss Hettie H. Fague, C. M. Forrest, Mrs. S. D. La Fetra, E. S. La Fetra, Mrs. Paul Wagner, and Miss Marietta Taskar, sustained such intimate and personal relations with decedent, and saw so much of her during her illness, and their opportunities for observing and noting the progress of Mrs. Magaw's illness were such as to entitle their evidence to great weight and consideration.

The question to be determined by the court is one of fact and not of law. It is not whether the mental faculties of the grantor in the deed before the court were more or less impaired by age and enfeebled by disease at the time it was made. It is rather, as expressed in the compact language of Lord Coke: "Did she know what she was about when she made the deed?"

The Supreme Court of North Carolina, in the case of Moffit *vs.* Witherspoon, adopted this rule as a guide to determine the mental capacity of the grantor in a deed, saying that it knew no better guide, and reversed the court below, which had instructed the jury that in judging of the sufficiency of the intelligence of the grantor in the deed in question, it was not sufficient that she be able merely to answer familiar questions, and to manage her business with judgment and discretion (10 Ired., 191).

The case of Dennett *vs.* Dennett, 44 N. H., 531, came up on a petition for a rehearing on a bill in chancery to set aside a deed on the ground of mental incapacity of the grantor. At the hearing upon the original bill, he was adjudged capable, and the rehearing was sought on that point alone. Chief Justice Bell in denying the application said:

> "All that the law requires to make a deed effective, is that the grantor should have possession of

his reason, so as to know the effect of the act he is to perform, and to be capable of carrying that act into effect. The question then in all cases, where an incapacity to contract, or a defect of mind is alleged, is not whether a person's mind is impaired, nor if it is affected by any form of insanity, but whether the powers of his mind have been so far affected by disease, as to render him incapable of transacting business like that in question."

Further on, the court said:

"A doubtful and uncertain point, at which the disposing mind disappears, and where incapacity begins, can only be ascertained by an examination of the particular circumstances of each case, to be duly weighed and considered by the court or jury; and in determining the question, the common sense and good judgment of the tribunal must be mainly relied upon" (pp. 538–539).

The rule announced in these cases is the same as that announced by this court in the case of Critchfield *vs.* Easterday, supra, and it is felt by the writer of this brief that a more extended citation of authorities could not aid the court in arriving at a proper solution of the question involved in the case at bar.

Osler, in his work on the "Practice of Medicine," speaking on aphasia, quotes from Langdon as follows:

"Sanity established, any legal document should be recognized when it can be proved that the person making it can understand fully its nature by any receptive channel (viz, hearing, vision, or muscular sense) and can, in addition, express assent or dissent with certainty to proper witnesses, whether this expression be by spoken speech, written speech, or pantomime" (page 993).

The right of plaintiff to attack the deed is measured by his interest in the property. In no event could the

deed be treated as wholly void and set aside, but only to the extent of his interest in the property, which is an undivided one-sixth interest.

It is respectfully submitted that the decree of the court below is right and should be affirmed.

The assignment of errors, on which this brief was founded, was furnished by one of plaintiff's counsel, and on the assumption that the order of discussion would proceed along the lines indicated therein, and as set out in this brief. Should the plaintiff see fit to change the assignments of error, the defendants reserve the right to reply thereto, should they deem such reply to be necessary.

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